Office-Supreme Court, U.S.
FILED
MAY 23 1981
ALEXANDER L.
CLERK

80-1978

No.

In the Supreme Court of the United States

October Term, 1980

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Petitioner

v.

THE UNITED STATES,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT H. RAYMOND, JR.
Assistant Chief Counsel
ROBERT W. CUNLIFFE
Deputy to the Chief Counsel
WARD T. WILLIAMS
Chief Counsel
JAY C. WALDMAN
General Counsel
Attorneys for Petitioner

Office of Chief Counsel
Department of Transportation
Commonwealth of Pennsylvania
Harrisburg, Pennsylvania 17120
(717) 787-2111

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

QUESTION PRESENTED FOR REVIEW

Whether the Court erred by ignoring Court of Claims Rule 147 (b) when it substituted its findings for the Trial Judge's findings on the reasonableness of the State's settlements of certain claims arising out of a Federal Highway Administration sponsored highway construction project when the evidence in the record did not rebut the normal presumption of correctness of the Trial Judge's findings?

TABLE OF CONTENTS

	PAGE
PETITION:	
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Rules Involved	2
Statement of the Case	4
Argument	8
Conclusion	13
APPENDIX A:	
Opinion of The United States Court of Claims of February 25, 1981	1a
Judgment of the United States Court of Claims of February 25, 1981	24a
APPENDIX B:	
Opinion of Trial Judge Fletcher of September 27, 1979	25a

TABLE OF AUTHORITIES

CASES:

Davis v. United States, 164 Ct. Cl. 612 (1964) 12

H. & H. Manufacturing Co., Inc. v. United States, 168 Ct. Cl. 873 (1965) 12

Hebah v. United States, 456 F.2d 696, 197 Ct. Cl. 729 (1972), cert. denied 409 U.S. 870 (1973) 9

J. D. Hedin Construction Co., Inc. v. United States, 347 F.2d 235, 171 Ct. Cl. 70 (1965) 9

Louisiana Department of Highways v. United States, 604 F.2d 1339, 221 Ct. Cl. —— (1979) 9, 10

STATUTE:

Federal-Aid Road Act of 1916, Ch. 241, 39 Stat. 355 as amended (23 U.S.C. §§101 et seq. (1976)) 2, 3, 4

RULES OF COURT:

United States Court of Claims Rule 147 (1976) 3, 6, 8, 12

OPINIONS BELOW

The opinion of the U. S. Court of Claims has not yet been reported, and a copy thereof is attached hereto as Appendix A. The judgment of the U. S. Court of Claims of February 25, 1981, is also attached hereto as Appendix A. The prior opinion of Trial Judge Fletcher, filed September 27, 1979, is attached hereto as Appendix B.

STATEMENT OF JURISDICTION

The U. S. Court of Claims filed its opinion and judgment on February 25, 1981. The basis for jurisdiction of this Court is found in 28 U.S.C. Section 1255(1).

STATUTES AND RULES INVOLVED

United States Statutes:

23 U.S.C. §106 (a):

> (a) Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title.

23 U.S.C. §120 (c):

> (c) Subject to the provisions of subsection (d) of this section, the Federal share payable on account of any project on the Interstate System provided for by funds made available under the provisions of section 108 (b) of the Federal-Aid Highway Act of 1956 shall be increased to 90 per centum of the total cost thereof, plus a percentage of the remaining 10 per centum of such cost in any State containing unappropriated and unreserved public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands therein,

equal to the percentage that the area of such lands in such State is of its total area, except that such Federal share payable on any project in any State shall not exceed 95 per centum of the total cost of such project.

Rule of the U. S. Court of Claims:

Rule 147 (b)

(b) Trial judge's report. The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.

STATEMENT OF THE CASE

This action, brought by the Commonwealth of Pennsylvania, Department of Transportation (State) against the United States, prayed that the United States, through its agent the Federal Highway Administration (FHWA), contribute 90 percent of the cost of certain expenditures made by the State in 1970. These expenditures were for settlements of claims brought by a local governmental authority, the Milford Water Authority (Milford), and the contractor, the Gasparini Excavating Co. (Gasparini), which claims arose out of the construction of Interstate Highway 84 (I-84) in northeastern Pennsylvania. The settlements were in the amounts of $275,000.00 and $835,000.00, respectively. Trial Judge Fletcher, in an opinion dated September 27, 1979 awarded $999,551.20 to the State. This case came before the U. S. Court of Claims on the FHWA's exceptions to this judgment.

Pursuant to the Federal-Aid Highway Act, 23 U.S.C. Section 106, the State and the FHWA entered into project agreements for the construction of I-84 effective July 5, 1966 and January 23, 1967. Actual construction began in April, 1967.

In August, 1967, Milford contacted the State, complaining that the highway construction was contaminating its water supply. Subsequent studies revealed that the highway construction was indeed the source of Milford's water supply contamination, and on December 27, 1967, Milford filed a complaint in equity in state court asking for the construction of a filtration system, the revision of

drainage, damages and "such other and further relief as may be deemed just and proper."

Negotiations began in earnest with Milford to forestall the issuance of an injunction and a project shutdown. The State agreed to restrict Gasparini's use of "borrow" excavation sites which might affect the water supply, and notified Gasparini of this restriction on December 22, 1967.

In May, 1968 the Department ordered Gasparini to stop work while the Department considered major grading and drainage revisions to alleviate the conditions causing contamination of the Milford water supply.

Negotiations proceeded with Gasparini and Milford to resolve the State's liability with regard to the impeding of Gasparini's operation and the pollution of Milford's water supply. Representatives of FHWA were present at these negotiations but offered no constructive comments.

In August, 1970 the State reached a settlement with Milford, eliminating the threat of an injunction. And, the Trial Judge, in his evaluation of this settlement, held, that the FHWA was obligated to reimburse the State for 90 percent of the $275,000.00.

Similarly, in May, 1970, the State reached a final settlement with Gasparini, eliminating the threat of litigation for damages. And, the Trial Judge in his evaluation of this settlement, held that the FHWA was obligated to reimburse the State 90 percent of the $835,000.00.

In regard to the Milford settlement, the facts show that the settlement of $275,000.00 was reasonable and necessary under the circumstances then existent. Although a consultant's report concluded that alternative solutions

existed (*i.e.*, the construction of a full scale water treatment plant at an estimated cost of $560,000.00, or a redesign of the drainage system at an estimated cost of $58,000.00), these alternatives were either too costly or possibly insufficient to effect the desired results. As the Trial Judge reasoned, the "plaintiff (State) acted reasonably in concluding that construction of the holding reservoir would be the most reliable cure for the turbidity problem." Trial Judge's opinion at 22, 23 (Appendix, p. 46a.)

The Trial Judge's findings are uncontroverted that the Milford settlement was made for the benefit of the highway construction project in order to avoid a shutdown or a major design change in the project. The Trial Judge found that the turbidity problem was attributable to the highway construction and the method of resolution contained in the settlement was reasonable.

The Trial Judge also concluded that the settlement with Gasparini was a reasonable part of the construction cost of the highway. Gasparini could have sued the State for damages in excess of $2,300,000.00. The State's legal officials, including the Attorney General, were of the opinion that this claim would be upheld in litigation, litigation which in its nature would have been exorbitantly expensive. Instead, as the Trial Judge reasoned, the State acted in good faith in settling this claim and the settlement was reasonable under the circumstances presented.

The Court of Claims ignored these findings by the Trial Judge and substituted its own findings, despite the absence of any reason to rebut the presumptive correctness of the Trial Judge's finding as espoused by Rule 147(b). Instead, the Court found that the implementation of the

drainage revision and an earlier order to Gasparini to start borrow operations in the spring of 1968, would have limited expenditures to $58,000.00 and $90,000.00, respectively, which in light of FHWA's 90 percent participation, would have resulted in federal expenditures of $52,200.00 and $81,000.00. The Court of Claims thus reduced the judgment of the Trial Judge to $153,200.00.

ARGUMENT

The State submits that the Court of Claims has erred in ignoring Rule 147 (b) of the Court of Claims Rules, and has thereby so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of certiorari. The Court of Claims' unwarranted substitution of its findings for those of the Trial Judge has resulted not only in loss to the State of $866,350.00 in Federal-Aid Highways Act funds, but also raises important questions for all states concerning the circumstances under which the FHWA may refuse to reimburse states for costs incurred in settlement of third-party claims arising during the course of highway construction.

Rule 147 provides in part:

> "(b) Trial judge's report. The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct."

Pursuant to this rule, a Trial Judge's findings of fact are presumed to be correct. Although the presumption does not extend to conclusions of law, it does encompass findings because of the Trial Judge's opportunity to hear the witnesses, to determine the weight to be accorded to

their testimony, and to evaluate both oral and documentary evidence in light of the circumstances presented. *Hebah v. United States,* 456 F.2d 696, 197 Ct. Cl. 729 (1972), *cert. denied* 409 U.S. 870 (1973).

"A party who undertakes to overcome this presumption must make a strong affirmative showing to the contrary." 456 F.2d at 698. When a case comes to the Court of Claims, the

> [D]efendant [FHWA] has the burden of showing that the Commissioner [*i.e.,* Trial Judge] was wrong in his factual conclusions. Such a task is far from slight since we start with the double directive that due regard must be given to the Commissioner's opportunity to judge the credibility of the witnesses and that his factual findings will be presumed to be correct. That presumption is dissipated only by a strong affirmative showing. *J. D. Hedin Construction Co., Inc. v. United States,* 347 F.2d 235, 240, 171 Ct. Cl. 70 (1965).

The Court of Claims erred both by ignoring the presumption that the Trial Judge's findings were correct, and by disregarding the FHWA's failure to shoulder its burden of affirmatively showing that the Trial Judge's findings were wrong.

The Trial Judge's findings recite in detail the circumstances surrounding the Milford and Gasparini settlements. In spite of the FHWA's allegations of negligence, the Trial Judge found that the State had not acted negligently but had responded in a reasonable fashion in settling with these third parties. In contradistinction to the situation presented in *Louisiana Department of Highways v. United States,* 604 F.2d 1339, 221 Ct. Cl. (1979), where the state's counsel admitted that a third-party contractor's

claim was entirely without merit and that a settlement was unreasonable, the Trial Judge concluded that there existed reasonable grounds for belief that the State would have been liable on the Milford and Gasparini claims.

> "Finally, further consideration should be given to this court's recent decision in *Louisiana Department of Highways v. United States,* Ct. Cl. No. 129-76, dated July 18, 1979, 604 F.2d 1339, in which it is held that in a claim for reimbursement under the Federal-Aid Highways Act, where the claim is for costs incurred in settlement of third-party claims against the state, there must be reasonable grounds for belief that the state would have been liable on the third party claims. In the *Louisiana* case, it was the opinion of the State's counsel, concurred in by the court, that the contractor's claim was entirely without merit. *The present case differs in that crucial respect.* Here, there is ample evidence that, in the opinion of Pennsylvania's responsible legal officials, the Commonwealth of Pennsylvania might well have been found liable to the third party claimants on the basis of any of several possible legal grounds had the claims finally gone to litigation. They determined in good faith that the claims should be settled, not merely to avoid expensive and troublesome litigation, but to avoid the possibility of substantially greater liability while, as stated above, the court should be reticent to look behind the assessments of Pennsylvania's legal officials as to the State's liability under Pennsylvania law, I nevertheless conclude that their conclusion to settle the claims was reasonably justified under the unexpected complexities that had gradually developed.

> "While I conclude it was not unreasonable for Penn DOT to believe that it faced a real danger of being held liable to the third party claimants, that potential liability was not grounded on negligence or unnecessary actions which would excuse the defendant's contractual obligation to reimburse plaintiff for its share of the costs necessary to avoid the threatened litigation. Given the Act's presumption in favor of reimbursement, there must be more than has been shown here to excuse that obligation. The Commonwealth of Pennsylvania should have judgment rendered in its favor in the sum of $999,551.20, and defendant's counterclaim for interest should be dismissed." (Emphasis added.) (Trial Judge's Opinion at 25-26.) (Appendix, pp. 48a-49a.)

The Court itself partly acknowledged these findings, stating that "the Trial Judge below found, and we concur, that these facts are insufficient to establish design negligence by the State." (Court's Opinion, at 9.) (Appendix, p. 13a.) As regards the Gasparini claim, the Court specifically held that it possessed "at least some merit". (*Id.* at 13.) (Appendix, p. 19a.)

It is at this juncture, absent clearly erroneous findings by the Trial Judge or an affirmative showing of error by the FHWA, that the Court's inquiry should have ended. The Court determined, however, that the Milford and Gasparini settlements were unreasonable. As regards the Milford settlement, the Court submitted that the settlement was unreasonable because the State failed to act as a "prudent businessman placed in a similar position". (*Id.* at 12.) (Appendix, p. 16a.) And with the Gasparini settlement, the Court suggested that the State had acted unreasonably by not authorizing an alternate borrow site until August, 1968. (*Id.* at 15.) (Appendix, p. 21a.)

These conclusions, however, were founded upon the Court's own findings of what a prudent man would have done under the circumstances, "typically and traditionally a question of fact." *H. & H. Manufacturing Co., Inc. v. United States,* 168 Ct. Cl. 873, 885 (1965). Thus, the Court committed error by ignoring Rule 147(b)'s presumption for the correctness of the Trial Judge's findings, and substituted findings unwarranted from the record.

There is also no evidence that the Court's conclusions are warranted by any strong affirmative showing from the FHWA to dissipate the rule's presumption. Allegations and innuendo alone are insufficient to abrogate the rule's scope. And, "where, as often happens, what appears to be a sound objection to a finding is answered by an equally sound explanation in support of it, the presumption will carry the day." *Davis v. United States,* 164 Ct. Cl. 612, 616-617 (1964). Clearly, the Court of Claims had no justification to substitute its findings for that of the Trial Judge in this case, and by so doing, it ignored both Rule 147(b)'s mandate and drastically departed from the accepted course of judicial proceedings.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Claims entered in these proceedings on February 25, 1981.

ROBERT H. RAYMOND, JR.
Assistant Chief Counsel
Office of Chief Counsel
Department of Transportation
Commonwealth of Pennsylvania
Harrisburg, Pennsylvania 17120
(717) 787-2111

ROBERT W. CUNLIFFE
Deputy to the Chief Counsel

WARD T. WILLIAMS
Chief Counsel

JAY C. WALDMAN
General Counsel
Attorneys for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 429-75

(Decided February 25, 1981)

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION
v. THE UNITED STATES

Robert H. Raymond, Jr., attorney of record, for plaintiff. *Robert W. Cunliffe* and *Edward G. Biester, Jr.*, of counsel.

David M. Cohen, with whom was *Assistant Attorney General Alice Daniel*, for defendant. *Richard J. Webber* and *Francis J. Locke*, of counsel.

Before NICHOLS, KASHIWA and SMITH, *Judges*.

OPINION

KASHIWA, *Judge*, delivered the opinion of the court:

This case comes before the court on defendant's exceptions to the recommended decision of Trial Judge Fletcher, filed September 27, 1979, pursuant to Rule

134(h). We must decide whether the trial judge was correct in concluding the federal government must contribute 90 percent of the actual settlement costs of two lawsuits arising from highway construction. After considering the written submissions of the parties and their oral presentations, we reject the trial judge's report and require 90 percent federal participation only to the extent expressed in this opinion.

Plaintiff Pennsylvania Department of Transportation (hereafter the State) has brought this suit alleging a breach by the United States (hereafter defendant) of an agreement requiring the United States to reimburse the State for 90 percent of the necessary costs of construction of Interstate Highway 84 in northeastern Pennsylvania. Neither party disputes that if reimbursement is owed, such reimbursement must, under the Federal-Aid Highways Act,[1] be at 90 percent of the allowable costs. The "costs" for which plaintiff seeks 90 percent reimbursement are unbudgeted amounts paid by the State to a utility (Milford Water Authority) and to the road construction contractor (Gasparini Excavating Company) in settlement of claims by those parties against the State.

In August 1967, several months after the excavation of the highway began, the utility complained to the Pennsylvania Department of Transportation that occasionally

[1] The statutory framework, now codified at 23 U.S.C. §§101 *et seq.* (1976), was first enacted in 1916 as the Federal-Aid Road Act of 1916, ch. 241, 39 Stat. 355. Although numerous successive road acts have altered minor details of the scheme, the 1916 framework of state expenditure with federal reimbursement has remained intact. For simplicity's sake, we refer hereafter to the statutory framework as if it were contained in a single act of Congress.

excessive amounts of particulate matter had begun to appear in its reservoirs, clouding the water. This clouded, or turbid, water was aesthetically displeasing and had an unpleasant taste. As some of the watersheds which fed the Milford reservoirs were located within the construction area, Milford felt the turbidity problem was caused by the exposure of bare slopes during highway construction.

The Department of Transportation engaged an engineering firm, Michael Baker, Jr. Inc., to study the relationship between the turbidity and highway construction. If the engineers found the turbidity and construction related, they were to propose solutions to the problem. The Baker engineering firm subcontracted the consulting report, so the actual engineering study was done by Gannett, Fleming, Corddry and Carpenter, Inc. (hereafter Gannett). Gannett monitored the turbidity from March 1967 through September 1968. Neither party disputes Gannett's expertise as engineers, nor the manner in which the study was conducted.

While Gannett was conducting the study, Milford filed a lawsuit on December 27, 1967, in a Pennsylvania state court seeking drainage revisions, monetary damages, construction of a filtration system, and other relief as the court should deem appropriate. Resolution of this lawsuit was apparently stayed while the Gannett study was being completed.

The Gannett study was issued on October 31, 1968. The Abstract of the Report adequately summarizes the conclusions and recommendations of the consulting engineers:

* * * * * *

The source of the turbidity is the excavation for Interstate Route 84, L.R. 1049, which is being constructed approximately one-half mile north of the Milford water supply reservoirs. The primary source is the cut slopes of the highway excavation between Vantine Brook and Vandermark Creek. After heavy rains, turbid runoff water from this area enters Vantine Brook and then infiltrates to the ground water body which feeds the Milford water supply reservoirs. * * *

The turbidity problem can be significantly reduced by transporting all drainage from the highway slopes east of Vantine Brook to Vandermark Greek, by stabilizing these same highway slopes with seed and mulch or other means, and by reducing the velocity and thereby the erosion tendency of water discharged to Vantine Brook. *The combined use of these measures would effect a significant reduction in the turbidity within two years. After this initial reduction it is expected that operating procedures at the Milford water supply can provide water of acceptable quality.* [Emphasis supplied.]

Should the measures described above prove to be insufficient the paving of infiltration zones along Vantine Brook or the construction of a clear water holding reservoir are feasible alternative solutions. The project costs for a one million gallon steel holding reservoir would be about $100,000; the total cost for channel lining cannot be determined without additional knowledge of the extent of the zones of infiltration along Vantine Brook. The construction of a holding reservoir would represent a permanent

improvement to the Milford supply. [Emphasis supplied.]

Thus, the primary recommendation of the Report was to redesign the area's drainage system and to rapidly replant the exposed slopes. This solution was the least expensive, with an estimated cost of $58,000, and was likely to provide an acceptable cure to the problem. More expensive measures, such as a one million gallon holding reservoir, costing $100,000, or a complete water treatment facility, costing $750,000, would not be necessary *unless* the drainage revisions and the replantings did not cure the problem. The record indicates the State did design a revised drainage system costing $58,000, but the revisions were never made.

Copies of the Report were given to Federal Highway Administration (FHWA) officials on November 6, 1978. Thereafter, State officials met with counsel for Milford in an effort to end the lawsuit. Staff members of the FHWA attended some of the meetings as observers but did not participate. The State agreed to finance the constructions of a 1.5 million gallon steel reservoir and to provide a five-year water-quality surveillance program.[2] The reservoir was not built.[3] Instead, by supplemental agreement, the State agreed to pay Milford $275,000 to release all claims against the State.

---

[2] The 1.5 million gallon reservior was 500,000 gallons in excess of that which the consulting engineers recommended as an alternative if the drainage revisions and replantings proved unsuccessful. The record offers no explanation why the State agreed to construct a reservior 50 percent greater than that thought necessary by the consultants it hired.

[3] The turbidity problem cured itself. The water today is of acceptable quality.

The State paid the money to Milford and submitted a formal request to the FHWA for reimbursement of the settlement cost as a construction expense under Project I-84-1 (19) 46. The FHWA denied federal participation on August 7, 1970. Thereafter, the State resubmitted the denied settlement costs as a right-of-way expense under Project I-84-1 (12) 46. Apparently not realizing the costs were being dealt with as construction expenses and had already been denied, the right-of-way personnel allowed the settlement costs under the right-of-way project. When the mistake was discovered, the FHWA recovered the $275,000 by means of a setoff against moneys owed Pennsylvania under other projects. Eventually, this suit followed.

Simultaneous with the events involving the Milford Water Authority, a related dispute arose between the Pennsylvania Department of Highways and its construction contractor, Gasparini. By letter of December 20, 1967, Gasparini requested the State's approval of a borrow site[4] known as the Olmstead site, beginning in spring 1968.[5] This was Gasparini's first formal request to use this particular site, although apparently other grading and borrow operations had occurred in 1967. The contract specifications required the State to approve any borrow site adjacent to the highway or likely to cause pollution of waterways. The Olmstead site was adjacent both to the highway and, unfortunately, to Vantine Brook, a feeder stream into the utility's reservoirs. Fearful that borrow

---

[4] A borrow site is where fill material for grading operations is excavated.

[5] Borrow and fill operations generally cannot be conducted during winter months in northern climates, as the frozen materials will not pack properly.

operations at the site would exacerbate the turbidity problem, the State indicated it would approve the site only if Milford also agreed to the borrow site. Gasparini sought, but did not receive, Milford approval. Nevertheless, throughout early 1968 the State encouraged Gasparini to continue to try to gain Milford approval of the Olmstead site rather than to direct the contractor to obtain fill elsewhere. The State finally formally directed Gasparini to use alternate borrow sites on August 12, 1968. Had the State directed the use of alternate borrow sites by April 1, 1968, additional costs of approximately $90,000 above the contract price for borrow would have been incurred.

By letter of August 20, 1968, Gasparini gave written notice of its intention to assert a claim for delay based on the borrow dispute. On February 20, 1970, Gasparini submitted a delay (and related expenses) claim of $2.3 million. The $2.3 million claim represented the contractor's total cost for the entire grading and borrow portions of the project, net of payments previously received, plus a $225,000 profit. The contractor computed his costs not on actual expenditures but, instead, by using artificial hourly rental ("force account") rates. By use of the force account rates, Gasparini's equipment charges were 300 percent of actual equipment costs.

State highway officials met with Gasparini to resolve the claim in March and April 1970. As with the Milford negotiations, FHWA staff members attended the meetings as observers but did not participate. At the April meeting, Gasparini offered to withdraw its $2.3 million claim if the State would pay $846,778, which Gasparini alleged represented its actual costs for the entire grading

and borrow portions of the project, plus a profit of $144,000. This proposal did not use the force account rates to compute equipment costs. The State tentatively accepted the settlement at the meeting and finalized the settlement by letter later that month. Gasparini was subsequently paid $835,612, of which 90 percent reimbursement is demanded from the United States.

We begin by observing that these settlement costs exceed the original Project Agreement cost limitations. Although neither party has cited authority which requires reimbursement of these unforeseen costs, the defendant concedes it has a policy of reimbursing unbudgeted settlement costs.[6] On brief, no doubt based on this policy, the defendant assumes that reimbursement of reasonable settlement costs is required (presumably under the original Project Agreement) and, instead, addresses itself to the question of to what extent these settlements were reasonable. There is nothing in this record which causes us to reject defendant's understanding of its obligations. The majority therefore cannot agree with the suggestion in

[6] The court's own research discloses that the FHWA had issued at least one formulation of this policy prior to the date of this Project Agreement, Paragraph 19 of Policy and Procedure Manual 21-6.3 (now 23 C.F.R. §635.120 (1980)). That paragraph seemingly became a part of this Agreement under a clause incorporating "regulations[,] * * * policies and procedures * * *" of the FHWA even though the paragraph was not then formally a regulation. *See People of the State of California v. United States*, 213 Ct. Cl. 329, 338, 551 F.2d 843, 848, *cert. denied*, 434 U.S. 857 (1977); *People of the State of California v. United States*, 547 F. 2d 1388, 1390 (9th Cir.), *cert. denied*, 434 U.S. 824 (1977). Neither party, however, has argued that Paragraph 19 applies to these settlements. Accordingly, we rest our decision on other grounds.

the concurring and dissenting opinion that reimbursement can only be required where a separate formal request has been made prior to settlement. On these facts, the defendant's view that it is required to reimburse reasonable settlement costs under the Project Agreement is sufficient.

Defendant's decision to *limit* its reimbursement obligation to only reasonable settlement costs, we think, necessarily follows from the statutory scheme (and its legislative history) establishing the federal highway aid program. From that scheme,

> * * * it is clear that Congress did contemplate that the Secretary exercise administrative expertise to see that apportioned funds are not expended on projects which fail to meet reasonable standards of cost.
>
> * * * * * *
>
> The Congressional intent is that the Secretary may exercise his discretion to insure that the roads are well constructed and safely built at the lowest possible cost, all in furtherance of the Act * * *.

State Highway Commission of Missouri v. Volpe, 479 F. 2d 1009, 1113-1114 (8th Cir. 1973); *see Mahler v. United States*, 306 F.2d 713, 718-719 (3d Cir.), *cert. denied*, 371 U.S. 923 (1962). *See also Citizens Organized to Defend Environment, Inc. v. Volpe*, 353 F. Supp. 520, 531 (S.D. Ohio 1972).

A rule requiring federal participation regardless of reasonableness might well be imprudent where the state disbursing the moneys bears only a small fraction of the true costs. Applying a rule of reasonableness to unforeseen costs in cases under the Act is consistent with the

more general rule requiring that a government contractor must proceed reasonably in order to recover expenses beyond the limitations contained in a cost-reimbursement contract. *E.g., Singer-General Precision, Inc. v. United States,* 192 Ct. Cl. 435, 427 F.2d 1187, 1192 (1970). We find the defendant's requirement, that unbudgeted settlement costs are reimbursable only if reasonable, to be proper. Indeed the State does not seriously dispute that only reasonable settlement costs are eligible for federal participation.

Nor does the State dispute the well-established rule in this court that a "government contractor bears the 'burden of establishing the fundamental facts of liability, causation and resultant injury.' " *Electronic and Missile Facilities, Inc. v. United States,* 189 Ct. Cl. 237, 253, 416 F.2d 1345, 1355 (1969), citing *Wunderlich Contracting Co. v. United States,* 173 Ct. Cl. 180, 199, 351 F.2d 956, 968 (1965); *Roberts v. United States,* 174 Ct. Cl. 940, 956, 357 F.2d 938, 949 (1966). *See also Huerta v. United States,* 212 Ct. Cl. 473, 548 F.2d 343 (1977).

Instead, the State argues as an initial matter that under the Federal-Aid Highways Act actual, or historic, costs are presumed to be reasonable. This alleged presumption, the State continues, shifts the ultimate burden of proof from it as a contractor, *see Electronic and Missile Facilities, supra,* to the defendant. Thus, once actual costs are shown in a suit under the Act, the State concludes, reimbursement must be made unless the *defendant* proves the actual costs are unreasonable. Following this reasoning, the trial judge below concluded that the defendant failed in its burden and that reimbursement was appropriate in the full amount sought by plaintiff.

We assume, *arguendo,* that a presumption for reimbursement does arise under the Federal-Aid Highways Act once actual payment by a state is shown. *Cf. Bruce Construction Corp. v. United States,* 163 Ct. Cl. 97, 102, 324 F.2d 516, 519 (1963) (in general equitable adjustment actions, "historical" costs are presumed reasonable). In modern federal civil practice, Federal Rule of Evidence 301 controls the effect of presumptions. It provides:

Rule 301.

PRESUMPTIONS IN GENERAL IN CIVIL ACTIONS AND PROCEEDINGS

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, *does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.* [Emphasis supplied.]

Thus, unless Congress has otherwise required the ultimate burden of proof in cases under the Act to shift to the Government, F.R.E. 301 requires the ultimate burden to remain with the State here, the presumption notwithstanding.

Nowhere in the Federal-Aid Highways Act is there an express requirement that the ultimate burden must shift once actual costs are shown. Moreover, although the language of a statute might implicitly require such a result, *cf., e.g., Griggs v. Duke Power Co.,* 401 U.S. 424, 432 (1971) (intent of Title VII is to shift burden to employer

to disprove discrimination); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (same), our review of the relevant legislative history surrounding the initial passage of the Act in 1916 convinces us that Congress was concerned that imprudent state action might drain the federal treasury. *E.g.*, H. Rep. No. 26, 64th Cong., 1st Sess. 4-5 (1916); S. Rep. No. 250, 64th Cong., 1st Sess. 15-6 (1916). *See generally Mahler v. United States*, 306 F.2d at 719-722. That concern seems inconsistent with a conclusion that Congress intended the FHWA to affirmatively disprove the reasonableness of state disbursals exceeding project spending limitations. Also, we are not unmindful that under the legislative scheme, the various states actually disburse the money and then seek reimbursement from the FHWA. Thus, a state seems far better able to prove the reasonableness of an expenditure than is the FHWA to disprove the reasonableness of the expenditure. For these and other reasons, no previous federal appellate decision has shifted the ultimate burden in an FHWA case to the Government. *See, e.g., People of the State of California v. United States*, 213 Ct. Cl. 329, 551 F.2d 843; *Louisiana Department of Highways v. United States*, 221 Ct. Cl. ——, 604 F.2d 1339 (1979); *Mahler v. United States, supra; State Highway Commission of Missouri v. Volpe, supra; People of the State of California v. United States*, 547 F.2d 1388. *See also Massachusetts v. Connor*, 248 F. Supp. 656 (D. Mass. 1966). We see no reason to reach a different result today merely because the State wishes it so.

Therefore, since Congress has not otherwise provided, F.R.E. 301 precludes the shifting of the ultimate burden from the State of Pennsylvania to the defendant. Since the defendant met the presumption by offering evidence

that the settlement costs were unreasonable, we now turn to each settlement to determine its reasonableness.

We begin by rejecting the defendant's argument that neither the Milford nor the Gasparini settlements could be reasonable because both disputes stemmed from the State's negligence in design of the highway. We are hesitant to adopt such a broad rule, especially where the FHWA must itself approve highway design prior to any construction. On these facts, however, we need not reach the absolute rule for which the defendant contends. The trial judge below found, and we concur, that these facts are insufficient to establish design negligence by the State. Similarly, we reject the State's initial argument that estoppel lies against the defendant to deny either claim. Nothing in this record convinces us the Government misled the State. Moreover, the thrust of the State's argument, that *Arizona Highway Department v. United States,* 204 Ct. Cl. 171, 494 F.2d 1285 (1974), somehow limits the Government's right to recover the erroneous payments of the Milford claim, is incorrect as a matter of law. The United States has inherent authority to recover sums erroneously paid, and it cannot be estopped from doing so by the mistakes of its officers or agents. *Aetna Casualty & Surety Co. v. United States,* 208 Ct. Cl. 515, 520, 526 F.2d 1127, 1130 (1976), and citations contained therein.

With these initial comments, we turn to the central matter, whether these settlement payments were reasonable.

Milford Settlement

In arguing that its settlement for $275,000 with the water utility was reasonable, the State stresses both that the Milford lawsuit posed an enormous potential liability

and that the drainage revisions its own consultants recommended were not guaranteed to solve the turbidity problem. Since the settlement ended all potential exposure, the State concludes, the settlement was *a fortiori* reasonable. For its part, the defendant asserts that the drainage revisions and replantings recommended by Gannett if implemented would have controlled the turbidity at a much lower cost. Thus, the defendant says, any settlement cost in excess of $58,000, the amount the State concedes the revisions and replantings would have cost, was unnecessary and hence unreasonable.[7]

The true liability that a lawsuit poses is rarely susceptible of precise quantification prior to final judgment. Both parties in litigation may encounter unforeseen difficulties of proof. The skill of opposing counsel and the resources each side can devote to the conflict may be additional unknowns. Moreover, no party can be precisely certain of the interpretation the trier of fact will give to either the facts or the law. All of these factors are difficult to quantify and even though free to recognize frivolous claims, we have been reluctant to second-guess the decisions of litigating parties and their counsel with respect to settlements involving claims of at least some merit. *Louisiana Department of Highways,* 221 Ct. Cl. at ——, 604 F.2d at 1347-1348. Our reluctance to sit

[7] The Government also argues that under Policy and Procedure Memorandum 30-4, which is applicable to this project, any settlement costs which exceed the cost of the drainage revisions and replantings constitute a betterment to the utility and are ineligible for federal participation. Under our holding, we need not reach this contention regarding Policy and Procedure Memorandum 30-4. Moreover, we note the argument also turns on a determination of whether the revisions and replantings were the reasonable solution to the turbidity problem.

as a local court on the merits of the Milford claim, however, does not insulate the eventual settlement from all scrutiny to determine reasonableness when federal participation is sought. Thus, the fact that these sums were expended to settle litigation is to be considered, but in no sense is decisive on the issue of their reasonableness.

In *Louisiana Department of Highways, supra,* the State of Louisiana had settled a claim with little, if any, merit. Under Paragraph 19 of Policy and Procedure manual 21-6.3, which had been incorporated into Louisiana's Project Agreement, reimbursement would only be made of settlement costs which were "grounded in contract provisions and specifications and actual costs incurred." In construing this language, we wrote:

> * * * the language particularly pertinent to this case is: 'the extent to which such settlements are grounded in contract provisions and specifications and actual costs incurred.' Though the wording is far from clear (and could and should be clarified) we understand this provision to mean that the Federal Highway Administration will refuse to participate if the contractor's claim is not reasonably, arguably, or colorably founded in some part of the contract or the specifications, fairly construed. Conversely, the regulation seems to mean that the Federal Government will not participate in a settlement of a contractor's claim which is wholly unmeritorious, insubstantial or frivolous. We take it to be the deliberate policy of the Highway Administration to discourage the making and settlement of such worthless claims by letting it be known in advance that it will not participate in a settlement—even though the Federal Government will be liable to share the costs

> of the litigation if the matter does go to trial. That policy choice is, of course, one for the Highway Administration to make. [221 Ct. Cl. at ——, 604 F. 2d at 1340.]

With that as a predicate, we concluded that, even if Louisiana's settlement with the contractor was assumed to be reasonable in a general sense when considering a policy favoring settlement of litigation, the standard expressed in Policy and Procedure Manual 21-6.3 demanded that "[a] contractor's claims have more substantiality and potential merit than the claim involved [there]." *Id.* We think similar considerations are applicable here. At a minimum, a claim against a state must have some basic merit to be considered for reimbursement as "reasonable." But the mere fact that a claim against a state may have some legal merit does not mean any possible settlement of the claim is reasonable. We must also look to whether the settlement, as made, appears to be reasonable on all of the facts available to a state at the time of settlement. We have, in other circumstances, characterized the duty of reasonableness in several ways, but the essence of the term is that a party must proceed prudently, wisely, and efficiently. *See H & H Manufacturing Co. v. United States,* 168 Ct. Cl. 873, 884-885 (1964); *Bruce Construction Corp. v. United States,* 163 Ct. Cl. at 100-101, 324 F.2d at 518-519; *Nager Electric Co. v. United States,* 194 Ct. Cl. 835, 852-853, 442 F.2d 936, 945-946 (1971). The settlement is reasonable only to the extent it would have been made "by a prudent businessman placed in a similar" position. *Nager Electric Co.,* 194 Ct. Cl. at 852, 442 F.2d at 945. *See Bruce Construction Corp.,* 163 Ct. Cl. at 100-101, 324 F.2d at 518-519.

Here, the Milford settlement for $275,000 was unreasonable in light of the alternative action the State might have taken to end its potential liability. As its own consultants' Report demonstrated, the Milford turbidity problem was likely to have been cured had the State implemented the drainage revisions and replantings costing $58,000 that it designed following the Report. While the State is correct that the engineers did not guarantee this solution, we think the State requires too much.

It is clear from the Report that the engineers concluded the drainage revisions and replantings would provide an acceptable and workable solution to the turbidity problem:

XII CONCLUSIONS

* * * * * *

> (11) The careful construction [of the drainage modifications] * * * should result in the gradual reduction of the turbidity problem at the Milford reservoirs. *They represent the fastest and most practical solution. It is expected that by following* * * * [*this recommendation*] *the problem can be reduced sufficiently in about two years to the point where operating procedures at the reservoirs can adequately handle the problem.* As the slopes of the highway stabilize, the turbidity problem should gradually reduce and, after five years, be minimal. [Emphasis supplied.]

Further, it is clear that Gannett recommended the drainage revisions and replantings as the most reasonable and economic solution to the problem. In the Report, Gannett exhaustively analyzed the sources of the problem, proposed solutions and evaluated the effectiveness of each

solution, and then compared the various alternatives on a cost-effective basis. Gannett's recommendation, based upon the 18-month study, was that the drainage revisions and replantings should be implemented and only if the replantings and revisions failed to control the problem would it be necessary to explore other more costly alternatives. After reviewing this record, we conclude implementation of the drainage revisions and replantings afforded the State an opportunity to resolve the Milford litigation at a far lower cost than the eventual cash settlement the State chose. We find a private businessman in such a position would have chosen to implement the drainage revisions and replantings to end the litigation. We require no less prudence from the State as a public businessman.

Therefore, we conclude that implementation of the drainage revisions and replantings at a cost of $58,000 provided the reasonable solution to the Milford litigation. We hold that defendant must participate only to the extent of 90 percent of $58,000, or $52,200, in the Milford settlement.

Gasparini Claim

To justify its Gasparini settlement, the State argues that it faced a potential liability of $2.3 million for Gasparini's excess borrow costs when the State formally required the use of an alternate borrow site on August 12, 1968. The defendant counters by asserting either that the State had an unqualified contract right to reject the Olmstead site without liability for excess costs or, alternatively, if liability existed, that the State unreasonably failed to mitigate the excess costs when it delayed until August 12, 1968, in requiring an alternate site.

Both parties have pled and argued Pennsylvania law in support of their respective positions on whether the State would have been found liable had Gasparini prosecuted its claim. After considering the arguments of each, we conclude the State has met the threshold test we have established for settlement costs to be reasonable, *i.e.*, there was at least some merit to the Gasparini claim. *See Commonwealth, G.S.A. v. Loffredo,* 16 Pa. Commonwealth Ct. 237, 328 A.2d 886 (1974). *See also Carbon Construction Co. v. Commonwealth, Department of Transportation,* Bd. of Arbitration No. 476 (decision of September 30, 1976). *But see Central Penn Industries, Inc. v. Commonwealth of Pennsylvania, Department of Transportation,* 25 Pa. Commonwealth Ct. 25, 358 A.2d 442 (1976). We have considerable doubt, however, that Gasparini's settlement proposals accurately reflected the excess costs incurred solely because of the alternate site requirement. We leave to another day whether erroneous assumptions concerning the true date of breach, the proper allocation of costs to the post breach period, and the profitability of the contractor may themselves render a settlement unreasonable. *See, e.g., Boyajian v. United States,* 191 Ct. Cl. 233, 239-240, 245-254, 423 F.2d 1231, 1235, 1238-1244 (1970), and cases cited therein.

As we have already discussed with regard to the Milford settlement, the State must demonstrate that it proceeded reasonably in settling the Gasparini litigation. Reasonableness requires, we think, not only that the State explore and adopt less expensive alternative means of terminating the lawsuit other than by outright cash settlement but, also, that the State proceed in a manner so that its potential liability on claims is kept to a minimum.

This record indicates that the State did not formally request Gasparini to use an alternate site until August 12, 1968, and in fact *encouraged* Gasparini throughout early 1968 to continue to seek approval (however unlikely) of the Olmstead site from Milford. This Gasparini did from December 1967 through August 1968. Milford, during this time, had already sued the State over the turbidity. The State's hope that Milford might gratuitously approve the Olmstead site and its potential for increased turbidity seems unfounded in light of Milford's observable willingness to protect its water supply. More prudently, the State at some point prior to the scheduled start of spring 1968 borrow operations should have concluded that no such approval would be forthcoming from Milford and that another borrow site would have to be used. Had the State acted, it could have avoided delay. The State was well aware that any delay in the start of the spring 1968 borrow operations would greatly increase the excess costs associated with an alternate site. Prudence dictated that the State make a timely decision so that delay could be avoided and any excess costs kept to a minimum. This the State failed to do. Had the State acted in a timely manner, the record is clear that Gasparini's excess borrow costs would have been significantly lower than the $846,000 the contractor claimed as a result of delay until August. The trial judge found, and we concur, that had the State required an alternate borrow site on April 1, 1968, Gasparini would have incurred additional costs approximately $90,000. The failure of the State to give such timely direction was unreasonable. *Cf. Astro-Space Laboratories, Inc. v. United States,* 200 Ct. Cl. 282, 308-309, 470 F.2d 1003, 1018 (1972) (reprocurement must occur in a timely manner after default and mitigation of damages to be reasonable).

Therefore, we conclude that the reasonable solution to the borrow site controversy was for the State to direct the contractor by the start of spring 1968 borrow operations to obtain borrow elsewhere. Had the State done this, the contractor's excess borrow costs would have been limited to $90,000. We hold that defendant must participate only to the extent of 90 percent of $90,000, or $81,000, in the Gasparini settlement.

Based on the foregoing, we conclude federal participation in these settlements is required to the extent of $52,200 plus $81,000, or $133,200. Judgment of $133,200 is entered for plaintiff.

NICHOLS, *Judge*, concurring and dissenting:

I agree with the holding of the panel insofar as it reduces the award from $999,551.20 to $133,200, but, respectfully, I would go further and dismiss the petition.

The FHWA contract with the State specified an amount and stated as follows: "[f]ederal funds are obligated for the project not to exceed the amount shown herein." The contract and relevant regulation on the pertinent date are silent as to what happens in case of unbudgeted claims, breaking the ceiling if allowed. I think, in such circumstances, certain requirements are implied, or are to be met by reformation to effect the real agreement of the parties. They are, if the State wishes to pay the claims and be reimbursed, it should obtain FHWA approval in advance. It is not sufficient to inform the FHWA officials to attend the settlement negotiations as observers. The State should have insisted on prompt

decisions. In argument before us, State counsel said they were fearful of an injunction suit (in the case of the Milford claim) and were aware by past experience how dilatory the FHWA would probably be in passing on requests for unbudgeted funds. I do not consider this excuse adequate. If defendant had failed to rule promptly on explicit reimbursement requests, thereby delaying the project and increasing the cost, it would have been liable in breach damages for failing in its "implied duty of cooperation and noninterference which is inherent in any contract." *S. A. Healy Co. v. United States*, 216 Ct. Cl. 172, 188, 576 F.2d 299, 306 (1978), and cases cited. But an implied burden on defendant to make a ruling promptly does not arise until it has a request for one before it.

I do not read *Louisiana Department of Highways v. United States*, 221 Ct. Cl. ——, 604 F.2d 1339 (1979) as the panel does. The opinion of Senior Trial Judge White, which the court adopts as its own, seems to me to hold in the concluding portion that the settlement there involved was "reasonable and in the public interest" but reimbursement was not allowable because not given approval by defendant before being paid. The court in its preliminary per curiam remarks construes the White opinion to view the settlement as prudent to make but not reimbursable because not "grounded in contract provisions and specifications and actual costs incurred," a standard stated in a regulation not argued to be applicable here. Apparently the regulation was meant to require disallowance of claim settlements even if prudent and reasonable, if the claim does not meet some objective criteria. But the court did not disavow the alternative ground stated in the White opinion and I think it is correct. Defend-

UNITED STATES COURT OF CLAIMS

No. 429-75

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION

vs.

THE UNITED STATES

At a Court of Claims held in the City of Washington, on the 25th day of February, A.D. 1981, judgment was ordered to be entered as follows:

IT IS ADJUDGED AND ORDERED that plaintiff recover of and from the United States pursuant to the court's opinion entered this date the sum of one hundred thirty three thousand two hundred dollars ($133,200.00).

A true copy of record.

In testimony whereof I have hereundo set my hand and affixed the seal of said Court at Washington, this 25th day of February, A.D. 1981.

Frank T. Peartree
Clerk, Court of Claims.

Attest: Daniel M. Friedman
Chief Judge.

ant did acknowledge that the FHWA has consistently contributed to additional (unbudgeted) costs (it deemed) reasonably incurred. That it has commendably waived the contract cost ceiling when persuaded the claim was reasonable, does not mean it waives it when not so persuaded. Nor do I think it can be estopped into a waiver by inaction (laches) of its representatives. *Costello v. United States,* 365 U.S. 265, 281 (1961).

It appears to me plaintiff is seeking equitable relief, whether we deem it reformation of the basic contract or enforcement of clauses added to it by implication. Where any obligation it incurs is supposedly to be reimbursed by the United States up to as much as 90 percent, it owes the United States a strong obligation in equity, first, to protect the interests of the United States, and second, to give it every opportunity to protect its own interests. It did not do the first, as we find, in the portions of the opinion I join in, that the settlements were grossly excessive. It did not do the second: instead of misconstruing the silence and nonfeasance of dilatory FHWA representatives, it should have demanded a decision in a manner to reach the attention of FHWA highest levels. He who seeks equity must do equity. Viewing the claim as equitable, as I do, I do not deem a claimant that had conducted itself as inequitably as Pennsylvania has here, can require us still to reconstruct the agreement of the parties to allow Pennsylvania the small amounts the majority consider properly allowable. I would let all the loss lie where it has fallen.

UNITED STATES COURT OF CLAIMS

No. 429-75

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION

vs.

THE UNITED STATES

At a Court of Claims held in the City of Washington, on the 25th day of February, A.D. 1981, judgment was ordered to be entered as follows:

IT IS ADJUDGED AND ORDERED that plaintiff recover of and from the United States pursuant to the court's opinion entered this date the sum of one hundred thirty three thousand two hundred dollars ($133,200.00).

A true copy of record.

In testimony whereof I have hereundo set my hand and affixed the seal of said Court at Washington, this 25th day of February, A.D. 1981.

Frank T. Peartree
Clerk, Court of Claims.

Attest: Daniel M. Friedman
Chief Judge.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS
TRIAL DIVISION

No. 429-75
(Filed: September 27, 1979)

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION

v.

THE UNITED STATES

Contracts; Federal-Aid Highways Act; reimbursement of State; litigation between highway contractor, affected utility, and State; settlement; Federal participation.

Stuart J. Moskovitz, Assistant Attorney General, attorney of record for plaintiff. *Robert W. Cunliffe, Deputy Attorney General* and *Gerald Gornish, Acting Attorney General,* of counsel.

Richard J. Webber, with whom was *Assistant Attorney General Barbara Allen Babcock,* for defendant.

OPINION*

FLETCHER, Trial Judge: This case presents a claim by the Commonwealth of Pennsylvania Department of Highways, (hereinafter "Penn DOT"), under the Federal-Aid Highways Act, 23 U.S.C. §§101 *et seq.* (1970). Penn DOT insists that it is entitled to reimbursement for 90 percent of certain costs incurred by it in the settlement of claims by third parties arising out of interstate highway construction in Pennsylvania.

Under the Federal-Aid Highways Act funds are appropriated and allocated among the states for the purpose of providing Federal participation in the construction costs of the interstate highway system. The degree of Federal participation is determined under a complex statutory formula which in this case yields a 90 percent Federal contribution.

Penn DOT had obtained Federal approval evidenced by Letters of Authorization for the proposed construction of a portion of Interstate Highway 84 in Northeastern Pennsylvania under the designation Project No. I-84-1 (19)46. After Federal approval of the project's detailed plans, specifications, and estimates, Penn DOT entered into project agreements with the Federal Government under which defendant was obligated to pay 90 percent of the estimated total cost of the construction and incidental utility and right-of-way expenses. Meanwhile, Penn DOT had contracted with the Gasparini Excavating Company (hereinafter "Gasparini" or "contractor") for clearing, grubbing, grading, drainage, and structures on

* The trial judge's recommended decision and conclusion of law are submitted in accordance with Rule 134 (h).

the project, and Gasparini commenced work on April 25, 1967.

On or about August 8, 1967, the Municipal Water Authority of the Borough of Milford (hereinafter "Authority" or "MWA") contacted Penn DOT complaining of excessive turbidity in the Authority's water supply which was located in reservoirs about one mile from the highway construction. The Authority expressed the view that the turbidity problem was the direct result of the highway construction operations being conducted in the neighborhood of its reservoirs.

Penn DOT engaged the firm of Gannett, Fleming, Corddry & Carpenter, Inc. to perform a study and prepare a report regarding the cause and cure of the above-described problem. The study was completed and an Engineering or Consultant's Report thereon was printed and issued under date of October 31, 1968.

The report concluded that the excavation for Interstate 84 was, in fact, the cause of the turbidity in the Authority's reservoirs. In addition, the report recommended alternative actions to cure the problem. The report stated that the surest way to eliminate the contamination of the water supply would be through the construction of a water treatment facility at an estimated cost of $560,000. Such a solution would take several years to complete and would represent a betterment to the Authority's facilities. The second most certain remedy would be the construction of a one million gallon steel holding reservoir at a probable cost of $100,000. Such a reservoir would be filled with water during periods of lesser turbidity and that water could be used in place of the water from the open reservoirs during periods of turbidity. Finally, the least ex-

pensive approach to the problem would call for the redesign of the drainage system coupled with rapid refoliation of the excavations and periodic monitoring of the water quality in the reservoirs. The cost of such drainage revision was estimated to be $58,000, and the report stated that the third approach would reduce the turbidity to a level where "it is expected that operating procedures at the Milford water supply can provide water of an acceptable quality." Both plaintiff and defendant rely on this Engineering Report and neither has questioned its accuracy.

Following conferences and an exchange of letters, on December 21, 1967, the Authority filed a Complaint in equity in the Commonwealth Court of Pennsylvania against the Pennsylvania Secretary of Highways, the Gasparini Excavating Company, and the consulting engineer. That suit demanded construction of a filtration system, redesign and revision of drainage, money damages, and "such other and further relief as may be deemed just and proper."

Conferences and negotiations between representatives of MWA and Penn DOT followed the filing of the Complaint. Also, it appears clear that representatives of the Federal Highway Administration (FHWA) were aware of these negotiations and even attended some of the conferences.

Following a meeting on November 27, 1968, a "Memorandum of Understanding" was prepared and signed by counsel for both Penn DOT and MWA. The Memorandum resulted in an agreement dated January 23, 1969 whereby plaintiff agreed to build a 1.5 million gallon reservoir and to provide a five-year water quality monitoring, or surveillance, program.

The January 23 agreement, however, was suspended by a later agreement dated August 3, 1970, whereby Penn DOT agreed to pay MWA $275,000 in return for MWA's release of Penn DOT from all claims and a voluntary dismissal of its pending court Complaint. At all times, cognizant representatives of FHWA were aware of the aforesaid negotiations and agreements between Penn DOT and MWA, but at no time did they either approve or disapprove them.

The Authority has never constructed a holding reservoir which might be deemed a permanent improvement to MWA facilities. In fact, by August 3, 1971, the level of turbidity had lessened to levels well within the requirements of the U.S. Public Health Service with no appreciable difference between the quality of the water upstream from the construction and that downstream from the construction. According to the testimony of a Penn DOT engineer, this would indicate that the I-84 construction presently does not contribute any significant turbidity to the Milford water supply. Of course, it was unknown at the time of the settlement between the Authority and Penn DOT that the contemplated corrective measures would not in fact be needed. Indeed, the experts had consistently taken a cautious approach. For example, after outlining a redesign of drainage facilities and a two-year surveillance program, the Engineering Report, *supra,* had this to say:

> B. If the program outlined under A above does not prove effective, it is recommended that a more elaborate program be undertaken. Specifically, it would be recommended that if all infiltration zones cannot be isolated and if the turbidity problem must be solved at the Milford reservoirs, the Penn-

sylvania Department of Highways should consider participating with the Municipal Authority of the Borough of Milford in the construction of a holding reservoir which would be filled with water during times when there is no turbidity and which would supply water to the system when both the present reservoirs are turbid.

The cost of such a holding reservoir was estimated to be about $100,000, plus the continuing costs of undertaking the recommended surveillance program. Meanwhile, as a consequence of the pollution of the Authority's water supply, Penn DOT had become concerned about the contractor's previous choice of a site for obtaining borrow[1] for highway grading. The contractor's choice had

---

[1] Pertinent contract provisions relating to borrow operations are as follows:

(a) *Specifications, Section 3.5.3*

The obtaining of borrow pits shall be the contractor's responsibility.

* * * *

Where the contractor desires to obtain borrow adjacent to the highway, written approval of the engineer shall be secured. * * *

* * * *

(c) *Specifications, Section 1.7.13*

* * * The contractor shall take all necessary precautions to prevent damage to all overhead and underground structures, and to protect and preserve property within and adjacent to the project and shall be responsible for damage thereto. Special care shall be exercised by the contractor in the prosecution of the work in order to avoid interference or damage to any operating utilities or plants; however, where there is any possibility of interference or damage, the contractor shall make satisfactory arrangements with the

been a property near the highway known as the Olmstead site which was adjacent to Vantine Brook, a feeder stream for the Authority's reservoirs. In order to avoid the possibility of further contamination of the Authority's water supply, Penn DOT directed that Gasparini could use the Olmstead site only if approved in advance by MWA. Gasparini was never able to obtain such approval from the Authority. After some delay, Gasparini was able to find another borrow site at a more distant location. This change resulted in increased hauling costs, and caused further construction delay. When that site was exhausted, additional borrow was still needed. In addition, the borrow at this alternative site was of lesser quality than that at the Olmstead site so that it became necessary to manually remove stones from the material, an unanticipated

---

responsible officers or with the owners of the utilities or plants; covering the necessary precautions to be used as safeguards during the performance of the work by the contractor. These arrangements shall be made before said work is started and shall be subject to the approval of the engineer, which approval shall not be considered as releasing the contractor from any responsibility for the acts of himself or his employees or representatives.

* * * *

(d) *Specifications, Section 1.7.19*

The contractor shall take sufficient precautions to prevent pollution of streams, lakes, and reservoirs with fuels, oils, bitumens, calcium chloride or other harmful materials. He shall schedule and conduct construction operations to prevent when necessary, and otherwise minimize, pollution of streams, etc., with sediment or other harmful materials.

The areas of erosive land exposed by construction operations at any one time which may cause subsequent water pollution, are subject to the approval of the Engineer.

operation, again causing delay and increased cost. These cumulative delays resulted in shifting the construction schedule into the winter months during which little activity was possible, thus causing further delay and expense.

On February 4, 1970, Gasparini presented a claim for additional costs predicated on the aforesaid delays and increased borrow costs. Two alternative claims were presented. One was for $2,300,000 which was the amount to be sought if litigation ultimately became necessary. The other, for a lesser amount, represented the figure for which Gasparini would be willing to settle. The difference in amounts was based primarily on a difference in accounting method. The higher amount based claims for equipment cost on accepted book rates for rental. The lesser amount represented actual costs which were documented by the contractor and which, pursuant to an audit by Penn DOT, were found to aggregate over $835,000.

As indicated previously, throughout the negotiations with the Authority and Gasparini, the FHWA representatives were kept fully informed at all levels. They were invited to and attended meetings where the claims of the Authority and the contractor were discussed. Yet, at none of these meetings did the FHWA representatives express an opinion for or against the potential settlements, and this refusal to offer guidance or any adverse comments caused the Department to conclude that FHWA had no objection to the settlements either with MWA or Gasparini.

The ultimate question now before the court would seem to be this: Under what circumstances, if any, may the FHWA refuse its agreed participation in costs which

were unanticipated at the time of the contract between the Federal and State Governments but which nonetheless were incurred by the State in connection with a Federal-Aid Highway project?

Considering the complexity and unpredictability of highway construction projects, and in the light of the conflicts inherent in an arrangement wherein one party (the state) manages the construction project while another party (the Federal Government) pays the bulk of the cost, one would have expected that in the fifty-odd years of Federal-Aid roadway projects this issue would have been confronted and fully resolved. So far as I can determine, however, it has not been so resolved, at least in the context of this case.

An answer to the question requires, initially, a brief review of the workings of Federal-Aid Highway projects. Under the Federal-Aid Highways Act, *supra,* after Congressional appropriation of highway funds, those funds are apportioned among the states. States then generate highway proposals which are submitted to the Secretary of Transportation for approval. The Secretary is then required to review the proposal applying criteria established by Section 109 of the Act. If the project is approved, the state then develops and submits detailed "plans, specifications, and estimates" for final approval by the Secretary. The Act specifies that approval of those detailed plans shall create "a contractual obligation of the Federal Government for the payment of its proportional contribution thereto." (Sec. 106(a)). Thereafter, the State and Federal Governments execute formal Project Agreements. In the present case, there was one agreement covering the acquisition of rights-of-way and another covering the actual highway construction. Those Project Agreements state, in pertinent part:

> The State, through its Highway department, having complied, or hereby agreeing to comply, with the terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto by the Secretary of Commerce and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project, and the Bureau of Public Roads [now the Federal Highways Administration] having authorized certain work to proceed as evidenced by the date entered opposite the specific item of work, Federal funds are obligated for the project not to exceed the amount shown herein, the balance of the total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the Bureau of Public Roads authorization to proceed with the project involving such costs.

Although the percentage of Federal participation may vary as between projects, in the instant case, the Federal reimbursement share is established by Sec. 120 of the Act to be "90 per centum of the total cost thereof."

Federal participation in a project after the signing of the Project Agreements typically seems to be quite limited. It is the state which purchases required right-of-way, arranges utility adjustments, enters into contracts with the companies that will perform the construction, and which generally oversees all aspects of construction, independently making all necessary decisions, routine and otherwise. There may be occasional Federal site inspections and Federal reviews and approvals of vouchers for costs incurred by the state. Where, as in the present case, unanticipated problems arise, officials of the FHWA may

be drawn more closely into the decision-making process. However, as shown by the facts here, their role can sometimes be merely one of passive observation.

At the finish of construction, the Act calls for Federal inspection of the finished project followed by final payment of the Federal share of the balance of cost upon approval by the Secretary.

The plaintiff contends essentially that where the claimed costs have arisen in connection with a Federal-Aid Highway Project and have been actually incurred by the State, the inquiry is at an end, and the FHWA must contribute its proportionate share of such costs. While there is considerable merit to this contention,[2] on balance it appears overly simplistic.

---

[2] As previously stated, the Act deems approval of the "plans, specifications, and estimates" to create a "contractual obligation of the Federal Government for the payment of its proportional contribution thereto." (Sec. 106 (a)). The degree of Federal participation is established by Sec. 120 of the Act which in this case sets the Federal participation at "90 per centum of the total cost thereof."

In addition to this statutory language, the legislative history of the Act lends some support to the plaintiff's position. The debates during the initial passage of the Act in 1916 reflect a concern with striking a balance between the protection of state independence in roadway construction and protection of the Federal Treasury against wasteful state spending. Those debates suggest that the Federal purse was thought to be adequately protected by the Act's provisions granting the Secretary of Agriculture (then administering the Act) the authority to review plans and refuse approval of those projects not meeting Federally established standards. In addition, the final inspection provision allowed the Secretary to withhold approval of future projects in states which failed to meet those standards in the execution of

The first weakness in plaintiff's preliminary contention is that it appears to ignore the well-settled rule that the FHWA may limit its participation in costs incurred by way of Policy and Procedure Memoranda (PPM) which are incorporated by reference into the Project Agreements. *People of the State of California v. United States,* 213 Ct. Cl. 329, 551 F.2d 843 (1977) (PPM limiting Federal participation in right-of-way acquisitions to fair market value rather than cost-of-replacement held binding on State); *People of the State of California v. United States,* 547 F.2d 1388 (9th Cir. 1977) (PPM limiting Federal participation in interest payments on condemnation awards to that amount accrued during the first 30 days from deposit in court held binding on State.)

While the Ninth Circuit decision directly addressed only the question of whether the PPM was enforceable by the FHWA, in reaching that conclusion, the court discussed the broader issue stating:

> The interpretation sought by the State would prevent the Secretary . . . from making any evaluation as to the reasonableness of the costs of construction or from promulgating regulations reasonably designed to limit such costs. Certainly, Congress must have intended that the statutory obligation to pay 90 percent of the total cost must include some corresponding right to impose reasonable limitations upon such costs, rather than leave the Federal Trea-

---

projects. Further protections of the Federal purse were apparently not then considered to be necessary or even desirable. S. Rep. No. 250, 64th Cong., 1st Sess. See generally, *Mahler v. United States,* 306 F.2d 713 (3d Cir. 1962).

> sury at the mercy of unfettered discretion by the State as to what expenditures may be made and charged accordingly. 547 F.2d at 1390.

Similar reasoning was applied in *Commonwealth of Massachusetts v. Connor*, 248 F. Supp. 656 (D. Mass. 1966) where Massachusetts sought by way of mandamus to force approval by the Secretary of a reimbursement voucher. The voucher represented the cost of a Federal-Aid Highway right-of-way as determined by a condemnation proceeding jury verdict. In refusing to grant mandamus relief, the court stated:

> Certainly the duty, if any, of the Secretary to approve the state's voucher in the present case is not a ministerial one. The Secretary must make a decision as to whether the claim presented is a proper one. Certainly it cannot be contended that he is bound to accept without question any claim in whatever amount Massachusetts wishes to make. 248 F. Supp. at 659.

The above cases are well-grounded in common sense. Absent some clear statutory or contractual statement to the contrary, it must be assumed that the intent of Congress and of the contracting parties was that the FHWA should, and does, retain some discretion to refuse participation in unreasonable costs incurred by the state.[3]

Another possible interpretation of the agreement between Penn DOT and the FHWA arises from certain lan-

---

[3] Indeed, even Pennsylvania seems to recognize this when, in its reply brief it fails to reassert the argument that the FHWA lacks such discretion, and seems to argue only that the FHWA must participate in "*reasonable*" costs.

guage of the Project Agreements. That language, stating that "Federal funds are obligated for the project not to exceed the amount shown herein," would appear at first blush to establish a cost reimbursement ceiling. From that language it could be argued that, absent prior contractual approval of a specific cost, the FHWA is under no obligation to reimburse the state for that cost.[4] In the present case, the settlements were neither included within the initial project agreements, nor were they approved as subsequent project modifications.

There are, however, problems with that interpretation. The language of the Project Agreements does not so clearly establish a maximum reimbursement amount that it cannot be interpreted in the light of contrary evidence. *See Scherr & McDermott, Inc. v. United States,* 175 Ct. Cl. 440, 360 F.2d 966 (1966). Also, such an interpretation would seem in conflict with the language of the Federal-Aid Highways Act discussed above and would depart from the administrative practice of FHWA which does not require prior approval of costs, but rather allows an evaluation of the cost after it has been incurred.[5]

---

[4] See for example, the recent decision in *Louisiana Department of Highways v. United States,* Ct. Cl. No. 129-76, —— F. 2d ——, decided July 18, 1979, which may well reflect this view by indicating that, because certain unanticipated costs were not contractually approved by the FHWA, the FHWA was not liable for participation despite a finding that the state had acted reasonably and in the public interest by incurring the costs in question.

[5] Closely related to the issue here is the question of the weight, if any, to be accorded the final decision of the FHWA denying reimbursement. It could possibly have been argued (but was not) that the function of this court under the circumstances here present is limited to a review of the FHWA's determination only

Here, Penn DOT orally sought advance FHWA approval of the settlements and urged quick action to avoid possible rejection by the third parties. In addition FHWA representatives were kept fully informed. They were invited to and attended most, if not all, of the meetings where the third parties' claims were discussed. They offered no guidance one way or the other, but voiced no objections, causing Penn DOT representatives reasonably to conclude that FHWA in fact had no objections. Nonetheless, several years later FHWA issued its decision denying the requested participation.

While neither of the parties has attempted to characterize the agreement herein, it seems to me, reading the statute and the project agreements together, that it can best be described as a specialized type of percentage-of-cost contract. Consequently, the rules generally applicable to cost reimbursement type contracts would seem applicable here.

As a general matter, the costs to be reimbursed under a cost-type contract are actual costs, not reasonable costs. *Charles A. Burton, Inc. v. Durkee,* 162 Ohio 433, 123

---

for possible arbitrary or capricious action. Such an argument, however, could be disposed of quickly. The decision of the FHWA is nothing more than a statement of position by one of the contracting parties. In the absence of some statutory or contractual provision for dispute resolution elsewhere, authority is vested in this court by the Tucker Act, 28 U.S.C. Sec. 1491, to render its decision *de novo.* Under these circumstances, it is clear that the decision of one of the contracting parties (the FHWA) carries no special weight in this court's disposition of the case. *See, Southwest Welding and Mfg. Co. v. United States,* 188 Ct. Cl. 925, 413 F.2d 1167 (1969). In fact, the court's task is to determine whether the FHWA's refusal to participate in the settlements was itself a breach of the contract.

N.E. 2d 432 (1954), 17 Am. Jur. 2d, Contracts Sec. 349. This court has held that actual or historical costs are presumed reasonable. *Nager Electric Co. v. United States,* 194 Ct. Cl. 835, 442 F.2d 936 (1971), *Bruce Construction Co. v. United States,* 163 Ct. Cl. 97, 324 F.2d 516 (1963).

In this case, there is no question but that the claimed costs of settlement were actually incurred. Since those costs are presumed reasonable, the burden rests with the defendant to justify its non-participation through persuasive evidence of fraud, misrepresentation, negligence, or some other affirmative proof of unreasonable behavior on the part of the plaintiff. *See,* James, *Burdens of Proof,* 47 Va. L. Rev. 51 (1961). To hold otherwise would encourage the Federal Government to sit idly by, as it did here, secure in the knowledge that the State must affirmatively justify the incurring of any unanticipated costs. This burden rests upon the defendant despite the presence in the Project Agreements of a clause purporting to establish a cost ceiling because "[t]he general rule with respect to a [cost reimbursement] contract, unless it is clearly negatived, is that the Government assumes the risk of expenses beyond the estimated price which are not due to unreasonable conduct by the contractor." *Singer-General Precision v. United States,* 192 Ct. Cl. 435, 446, 427 F. 2d 1187 (1970), citing *Wyman-Gordon Co.,* 59-2 BCA para. 2344 ASBCA No. 5100. *See* also *Lykes Bros. SS Co. v. United States,* 198 Ct. Cl. 312, 459 F.2d 1393 (1972) holding that the burden of proof does not necessarily follow the burden of pleading. In my opinion, defendant has not succeeded in discharging its burden of proving negligent conduct or other unreasonable behavior on the part of Penn DOT.

In this connection it is important to bear in mind that all of the unanticipated costs here claimed were expended by plaintiff in the settlement of actual and potential legal actions. Of course, it cannot be the task of this court here to decide the probable outcome of some hypothetical litigation in the Pennsylvania courts between Penn DOT and MWA or Gasparini. Had those disputes gone to trial in Pennsylvania, Penn DOT would have been found to be either liable or not liable for specific reasons. There would be no gray area. Those disputes, however, did not go to trial in Pennsylvania, and MWA and Gasparini were neither present nor represented at the trial of the present case. Since the disputes were settled without trial, this court surely cannot be called upon to determine the probable outcome of any hypothetical local litigation. Instead, one should test the reasonableness of the settlements, by making a determination which must take into account factors more than the relative merits of the disputants' legal positions. One factor to be considered is the public policy which favors settlement of legal disputes thereby decreasing the burden on limited judicial resources. From the perspective of the parties, settlements will preserve their personal and financial resources, reduce acrimony, and improve the prospects for satisfactory future relationships between the parties. Finally, of course, settlements eliminate the uncertainties always attendant upon any trial. All of these considerations are difficult to quantify, and even though free to recognize frivolous claims, courts should be reticent to "second-guess" the decisions of litigating parties and their counsel with respect to matters which involve claims having potential merit. *See Louisiana Department of Highways v. United States, supra.* Despite the criticisms

expressed by the Auditor General of Pennsylvania in his letter of July 20, 1970, to the Secretary of Transportation,[6] (finding 40) I am persuaded by the record in this case that Penn DOT's actions in this regard were not negligent in the legal sense and that the firm belief of the Attorney General (finding 38) that the claims had merit was correct.

In sum, where unanticipated costs arise in connection with an approved Federal-Aid Highway project and the Federal Government refuses to participate in those costs, the state must prove that such costs were actually incurred and that they arose out of a federally approved project. Such evidence establishes a *prima facie* case for reimbursement. Since under those cimcumstances the statute creates a presumption in favor of payment, the burden then must fall upon the Federal Government to justify non-payment through proving a breach by the plaintiff. If there are no contract provisions, PPMs for example, limiting the Federal obligation, then the Government must affirmatively prove that the state expenditure was unreasonable.

The defendant's first affirmative defense to payment of its proportionate share of the unanticipated costs is that all of the additional costs were incurred as a result of the damage to the Milford Water Authority and that such damage was a result of negligence on the part of the plaintiff's employees. In support of this contention, defendant introduced documentary evidence suggesting that certain Pennsylvania officials were of the opinion that Penn

---

[6] It should be noted that during his testimony at the trial of this case, Mr. Casey appeared to retract, or at least considerably soften, his earlier criticisms of Penn DOT's actions.

DOT acted negligently in the design and construction of the highway because the State had received notice of the possibility of harm to the Authority's reservoirs. See findings 37-40. However, the only direct evidence of notice to Penn DOT, is contained in a letter from the Authority to Penn DOT dated December 27, 1965. That letter stated:

> We have been advised by our engineer, that he does not believe that the construction of this highway will affect our springs or the probable locations of the veins of water leading to the springs.
>
> However, there is always a possibility that if there were deep cutting or blasting done in the event [sic] of these veins, the supply of water to these springs could be disrupted.

Negligence, of course, will not be presumed, and in my view it has not been established by the evidence in this case. Aside from some opinions of Pennsylvania officials rendered several years after the effect of the construction on the reservoirs became known, there remains only the letter quoted above which in a rather awkward way appears to conclude that damage to the reservoirs or water supply was not likely.

It should also be noted that the location and design of the highway had been previously approved by the defendant itself which apparently did not recognize the possibility of contamination of the Authority's reservoirs located less than a mile from the construction.

Finally, the defendant suggests nothing that could and should have been done differently. It seems clear that, in order to avoid participation in unanticipated costs incurred in connection with highway construction, the de-

fendant must show that the cost to it would have been less had the acts complained of not taken place. Here there is no evidence showing that the highway could have been built without incurring the cost of eliminating the contribution of the highway's construction to unacceptable turbidity in the Authority's reservoirs.

The defendant makes the alternative argument that, even if the Federal Government is obligated to contribute to the cost of the settlement between the Commonwealth of Pennsylvania and the Milford Water Authority, that obligation is limited to the cost of a drainage revision, a substantially lesser cost than the actual settlement amount.

In support of this argument, defendant first relies on its Policy and Procedure Memorandum ("PPM") 30-4 as limiting its participation to that portion of the MWA settlement which does not represent a "betterment" to the Authority's preexisting facilities.

There remains no doubt that the Federal Government's reimbursement obligation may be limited by its Policy and Procedure Memoranda which are incorporated by reference into the terms of the Project Agreements between the State and Federal Governments.[7] *People of the*

[7] Of course, only those regulations which are in effect at the time of the making of the contract can be incorporated by reference. *Sundstrand Turbo v. The United States*, 182 Ct. Cl. 31, 389 F.2d 406 (1968). The PPM at issue here was issued on October 15, 1966, after the date of the Secretary's approval of the "plans, specifications, and estimates" and after the effective date of the Project Agreement covering construction. The plaintiff addresses this issue only by once characterizing this PPM as "after-the-fact," without explanation. For the purposes of this decision, it is not necessary to decide whether this PPM was, in fact, incorporated into the contract. It will be assumed *arguendo* that it was.

State of California v. United States, 213 Ct. Cl. 329, 551 F.2d 843 (1977). PPM 30-4 states that the Federal reimbursement share for utility adjustments shall be limited to the total cost incurred less any portion which represents a "betterment" to the utility. Defendant contends that plaintiff, if entitled to some compensation is entitled to only the cost incurred in the settlement less the difference between the cost of a drainage revision and the cost of the holding reservoir because in the Government's view the surplus over the drainage revision cost represented a betterment and was so described by the consultants in their Report.

"Betterment" is defined by PPM 30-4 to mean "any upgrading made solely for the benefit of and at the election of the utility, not attributable to the highway construction." In the context of this case, however, plaintiff is entitled to full reimbursement if the holding reservoir reasonably appeared to be the *minimum* necessary cure for the damage caused by the highway construction.[8]

Defendant points to opinions contained in the consultants' Report to the effect that a drainage revision could be effectuated quickly and would significantly reduce the turbidity problem. The consultants, however, specifically advised that such measures might not prove to be sufficient, and if insufficient, other more costly cures would

[8] The defendant repeatedly and correctly points out that the holding reservoir was never actually constructed by the Milford Water Authority. This fact, however, should be of no comfort to defendant. All that is necessary is that the plaintiff reasonably believed the holding reservoir to be necessary at the time the decision to settle was made. *Sundstrand Turbo v. United States, supra.* All are blessed with 20-20 vision hindsight but few can claim the same of their foresight.

have to be effectuated. The Report found that construction of a water treatment facility might become necessary. The alternative of the holding reservoir "would cost less than half as much as the treatment plant and could represent a nearly 100 percent effective solution to the turbidity problem." Consultants' Report p. 61. In addition, the consulting engineers never attempted to design a drainage revision. That task fell to Mr. Finn, Pennsylvania's Construction Engineer for the project, and his group of engineers. His uncontroverted testimony was that they were unable to design a practical drainage revision.

Under all of these circumstances, it is my opinion that the plaintiff acted reasonably in concluding that construction of the holding reservoir would be the most reliable cure for the turbidity problem and since that problem was entirely attributable to the highway construction, it would not represent a betterment to the Authority's existing facilities.[9]

Defendant then proceeds to argue that the FHWA is not obligated to participate in the cost of the settlement with the Gasparini Construction Company. In support of this contention, defendant says that no claim by Gasparini would have arisen but for the plaintiff's negligence in causing the turbidity problem. Having previously concluded that the turbidity problem was not negligently caused, an argument based upon the contrary conclusion clearly cannot be accepted. In addition, however, there

[9] As an alternative argument for limiting Federal reimbursement to the cost of a drainage revision, the defendant contends that, quite apart from the PPM limitation, it was unreasonable for the plaintiff to agree to build a holding reservoir. This contention is essentially the same as that raised by the principal argument and is necessarily resolved the same way.

is an element not present in the Milford Water Authority settlement claim but present in the Gasparini claim. It raises a subsidiary issue of whether the defendant's participation is foreclosed by Penn DOT's alleged fraud or misrepresentation. The defendant points to letter opinions by the Attorney General of Pennsylvania and his deputy stating their belief that the State would be liable to Gasparini because the State's failure to inform the contractor of the possibility that the construction might cause contamination to the water supply of MWA amounted to fraud or misrepresentation.

This contention must fail in the light of the limited evidence of prior knowledge of such possible contamination on the part of Penn DOT. As previously stated, the defendant presented only a letter from the Authority to Penn DOT and that letter concluded in effect that the highway construction was unlikely to contaminate the Authority's water supplies. Such knowledge would hardly require Penn DOT to inform the contractor of the possibility of contamination.

The defendant also claims that it is not liable for its share of the cost of the Gasparini settlement because under the terms of the contract between Pennsylvania and Gasparini, Pennsylvania had the right to refuse approval of borrow sites. Hence, defendant says since Pennsylvania by refusing to approve the Olmstead site was merely exercising a contractual right, it was not liable to Gasparini for the resulting delay. Thus, in defendant's view, the settlement payment was gratuitous and the Federal Government need not participate in gratuitous payments. The plaintiff, of course, interprets the applicable specification differently because it believes that the right to reject a borrow site under section 1.7.19 dealt only with con-

siderations of possible erosion after completion of the work and not with the effect of the borrow operation during the construction period.

Here again, the resolution of this issue is not for this court's determination of whether Penn DOT had a contractual right under Pennsylvania law to refuse approval of the Olmstead borrow site. To repeat, the basic task for this court is to determine whether the Federal Government has shown that it was unreasonable, in light of the complexities involved, for Penn DOT to enter into the settlement with Gasparini. In my opinion, defendant has failed to carry that burden.

Finally, further consideration should be given to this court's recent decision in *Louisiana Department of Highways v. United States,* Ct. Cl. No. 129-76, dated July 18, 1979, F.2d , in which it is held that in a claim for reimbursement under the Federal-Aid Highways Act, where the claim is for costs incurred in settlement of third-party claims against the state, there must be reasonable grounds for belief that the state would have been liable on the third party claims. In the *Louisiana* case, it was the opinion of the State's counsel, concurred in by the court, that the contractor's claim was entirely without merit. The present case differs in that crucial respect. Here, there is ample evidence that, in the opinion of Pennsylvania's responsible legal officials, the Commonwealth of Pennsylvania might well have been found liable to the third party claimants on the basis of any of several possible legal grounds had the claims finally gone to litigation. They determined in good faith that the claims should, be settled, not merely to avoid expensive and troublesome litigation, but to avoid the possibility of substantially greater liability. While, as stated above, the court should

be reticent to look behind the assessments of Pennsylvania's legal officials as to the State's liability under Pennsylvania law, I nevertheless conclude that their conclusion to settle the claims was reasonably justified under the unexpected complexities that had gradually developed.

While I conclude it was not unreasonable for Penn DOT to believe that it faced a real danger of being held liable to the third party claimants, that potential liability was not grounded on negligence or unnecessary actions which would excuse the defendant's contractual obligation to reimburse plaintiff for its share of the costs necessary to avoid the threatened litigation. Given the Act's presumption in favor of reimbursement, there must be more than has been shown here to excuse that obligation. The Commonwealth of Pennsylvania should have judgment rendered in its favor in the sum of $999,551.20, and defendant's counterclaim for interest should be dismissed.

FINDINGS OF FACT

---

1. This action arises out of the Federal-Aid Highway Act, 23 U.S.C. Secs. 101 *et. seq.* (1970). Under that Act, the Federal Government assumes a proportionate share of the costs incurred by the several states in the construction of Interstate Highway projects. In this case, the applicable Federal participation, as determined under §120(c) of the Act, was "90 per centum of the total cost thereof."

2. Section 106 of the Federal-Aid Highway Act provides in part:

Section 106. Plans, specifications, and estimates

(a) Except as provided in section 117 of this title the State highway department shall submit to the Secretary for his approval, as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, *and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto.* In taking such action, the Secretary shall be guided by the provisions of section 109 of this title. [Emphasis supplied.]

3. Effective January 23, 1967, defendant, acting through the Bureau of Public Roads (now the Federal Highway Administration), (hereinafter "FHWA") issued a Letter of Authorization for construction of Federal Aid Project No. I-84-1 (19) 46, a segment of Interstate Highway 84 in Northeastern Pennsylvania. A similar Letter of Authorization had previously been issued for acquisition of rights-of-way and for utility readjustment expenses incident to the construction.

4. Plaintiff, Pennsylvania Department of Transportation (hereinafter "plaintiff" or "Penn DOT") contracted on April 18, 1967, with Gasparini Excavating Company (hereinafter "Gasparini" or "the contractor") for the grading and drainage of the aforesaid portion of I-84. The contract period was 275 working days and the estimated price was $3,047,572.94.

5. Thereafter, plaintiff and defendant entered into two Federal-Aid Project Agreements, each of which provided, in part:

> The State, through its Highway Department, having complied, or hereby agreeing to comply, with the terms and conditions set forth in (1) Title 23, U.S. Code, Highways, (2) the Regulations issued pursuant thereto by the Secretary of Commerce and, (3) the policies and procedures promulgated by the Federal Highway Administrator relative to the above designated project, and the Bureau of Public Roads having authorized certain work to proceed as evidenced by the date entered opposite the specific item of work, Federal funds are obligated for the project not to exceed the amount shown herein, the balance of the estimated total cost being an obligation of the State. Such obligation of Federal funds extends only to project costs incurred by the State after the Bureau of Public Roads authorization to proceed with the project involving such costs.

6. Gasparini commenced the physical construction of the project on April 25, 1967.

Claim of Milford Water Authority

7. In early August 1967, the Milford Water Authority (hereinafter the "Authority" or "MWA") contacted plaintiff, indicating MWA's belief that the excavation and grading operations taking place on the project were adversely affecting the Authority's water reservoirs, especially after periods of heavy rain. The problems being encountered included discoloration of the water, turbidity, deterioration in the potability of the water (citing one occasion when a sample from the East Reservoir did not

meet the recommended limits of the Pennsylvania Department of Health with respect to color, turbidity, and iron content), possible effects on clothing, and problems with contamination of distribution mechanisms.

8. Penn DOT engaged the firm of Gannet, Fleming, Corddry & Carpenter, Inc. to perform a study and prepare a report regarding the cause and cure of the above-described problem. The study was completed and an engineering or consultant's report thereon was printed and issued under date of October 31, 1968.

9. The report concluded that the excavation for Interstate 84 was, in fact, the cause of the turbidity in the Authority's reservoirs. In addition, the report recommended alternative actions to cure the problem. The report stated that the surest way to eliminate the contamination of the water supply would be through the construction of a water treatment facility at an estimated cost of $560,000. Such a solution would take several years to complete and would represent a betterment to the Authority's facilities. The second most certain remedy would be the construction of a one-million gallon steel holding reservoir at a probable cost of $100,000. Such a reservoir would be filled with water during periods of lesser turbidity and that water could be used in place of the water from the open reservoirs during periods of turbidity. Finally, the least expensive approach to the problem would call for the redesign of the drainage system coupled with rapid refoliation of the excavations and periodic monitoring of the water quality in the reservoirs. The cost of such drainage revision was estimated to be $58,000, and the report stated that the third approach would reduce the turbidity to a level where "it is expected that

operating procedures at the Milford water supply can provide water of an acceptable quality." Both plaintiff and defendant rely on this Engineering Report and neither has questioned its accuracy.

10. Prior to the issuance of the above-described report, meetings had been arranged between MWA and Penn DOT officials. A memorandum of October 6, 1967 to Mr. H. Poulson, Deputy Chief Engineer, from A. V. Cesare, Civil Engineer, describes a meeting of October 5, 1967, attended by Pennsylvania Deputy Attorney Generals John Rezzolla and Robert Cunliffe, as follows:

> As you requested, I attended a meeting on Thursday, October 5, 1967 in John Rezzolla's office to discuss the complaint concerning the possible contamination of the Milford Reservoirs by our Highway Construction on L. R. 1012-14.
>
> Unfortunately, the complainants did not appear and Rezzolla called the meeting off. We did, however, discuss the problem at length with John Rezzolla, Robert Cunliffe, and Joseph Jendrejewski from District 4-0.
>
> Some of the pertinent results of this discussion were:
>
> 1. The rough grading is completed and the fine grading and seeding will be completed within a week or so within the controversial area. Since this is only a grading project and the paving contract will not be let for several years, an injunction would have no serious effect on the immediate progress of the work.
>
> 2. Apparently the complainants had a study made by a geologist from Pennsylvania State University which indicates that our project may be contaminating this reservoir.

3. Our own soils people feel that we could possibly be contaminating the reservoir.

4. John Rezzolla feels that we should have a complete study made by a competent hydraulic engineer to support our position either way. We agree with this necessity. The District will explore this further and be in contact with our office.

11. Thereafter, in a letter of October 17, 1967, Robert G. Bartlett, plaintiff's Secretary of Highways, wrote the following to the MWA:

> This will acknowledge receipt of your letter of October 11, 1967, advising me that the Board of Directors of the Municipal Authority of the Borough of Milford have directed their Solicitor to institute injunction proceedings against the Department of Highways and its contractor in order to protect its water supply.
>
> Please be advised that representatives of our District Engineer's Office in Dunmore, our Chief Engineer's Office and our Chief Counsel were to meet with your Solicitor on October 5, 1967, at the Chief Counsel's Office.
>
> If the Solicitor would have attended this meeting, he would have learned that the contractor had ceased excavating and grading operations in this area because he is now at grade. The only operations now being carried on are those which will be of benefit to the Authority if the cause of the turbidity is the highway cut, namely, seeding and mulching and drains. Paving is not to take place until 1969. The Solicitor would also have learned that this Department has ordered a study by Hydraulic Engineers

to determine if the turbidity is being caused by the Highway cut and if so, what corrective steps can be taken to insure that the Authority receives the same quality of water it had in the past.

When this study has been completed, we will be in touch with the Authority to advise them of the findings. In view of the aforementioned facts, we do not believe that the Authority should seek a remedy in equity at this time.

Thank you for your best wishes for my tenure in office, and I assure you that the Authority will receive the cooperation of the Department of Highways if it is established that we are causing the alleged damage.

12. On December 27, 1967, the Authority filed in the Commonwealth Court of Pennsylvania a Complaint in Equity demanding construction of a filtration system, redesign and revision of drainage, money damages and "for such other and further relief as may be deemed just and proper." At the time the complaint was filed, excavation and grading in the pollution-causing area had ceased and the road was up to grade. The remaining work was of a type which actually would reduce but not cure the pollution problem.

13. A summary of the conclusions of the consulting engineers appears at the beginning of the Engineering Report as follows:

ABSTRACT

Turbidity in the water supply reservoirs of the Municipal Authority of the Borough of Milford could result in the supplying of water to customers with a quality less than that recommended by the Pennsyl-

vania Department of Health. The turbidity, which occurs after periods of heavy precipitation, is a suspension of very fine material. The East Reservoir is affected by turbidity more often and for longer periods of time than the West Reservoir.

The source of the turbidity is the excavation for Interstate Route 84, L. R. 1049, which is being constructed approximately one-half mile north of the Milford water supply reservoirs. The primary source is the cut slopes of the highway excavation between Vantine Brook and Vandermark Creek. After heavy rains, turbid runoff water from this area enters Vantine Brook and then infiltrates to the ground water body which feeds the Milford water supply reservoirs.

The construction drawings for Interstate Route 184 in the Vantine Brook and Sawkill Creek watersheds indicate that the highway design meets recognized standards and practices.

The turbidity problem can be significantly reduced by transporting all drainage from the highway slopes east of Vantine Brook to Vandermark Creek, by stabilizing these same highway slopes with seed and mulch or other means, and by reducing the velocity and thereby the erosion tendency of water discharged to Vantine Brook. The combined use of these measures would effect a significant reduction in the turbidity within two years. After this initial reduction it is expected that operating procedures at the Milford water supply can provide water of acceptable quality.

Should the measures described above prove to be insufficient, the paving of infiltration zones along

Vantine Brook or the construction of a clear water holding reservoir are feasible alternative solutions. The project costs for a one million gallon steel holding reservoir would be about $100,000; the total cost for channel lining cannot be determined without additional knowledge of the extent of the zones of infiltration along Vantine Brook. The construction of a holding reservoir would represent a permanent improvement to the Milford supply.

The construction of Interstate Route 84 will not cause a significant change in the yield of the Milford water supply and has not significantly affected the storage capacity of the contributing ground water aquifer.

Future roadway salting for Interstate Route 84 may cause a slight increase in the chloride content of the Milford water supply, but is not expected to cause the chloride content to approach or exceed the maximum concentration recommended by the Pennsylvania Department of Health.

14. The report describes MWA's physical plant as consisting of two reservoirs, designated West and East, each of which is fed primarily by an enclosed spring. The average daily demand on the water supply system is 200,000 gpd (gallons per day), and peak demand is estimated at 500,000 gpd. The combined storage capacity of the two reservoirs is 550,000 gallons. Total yield from the springs which feed the reservoirs is estimated as 1,750,000 gpd.

15. Occurrences of turbidity in each of the reservoirs were monitored from May 1967 to September 1968. The turbidity appeared within eight hours after a heavy

rain, primarily in the East Reservoir, although the West Reservoir had traces of turbidity on occasion. The turbidity lasted from one to several days after a rainfall. Only one water sample, taken on August 25, 1967, showed a quality which did not meet the recommended limits of the Pennsylvania Department of Health, and that condition occurred in the East Reservoir only.

The Report discusses alternative solutions to the turbidity problem and, with respect to highway drainage, stated in part:

> (1) *Highway drainage.* Changing the drainage pattern at the highway will have the greatest effect on reducing that turbidity which has been following natural drainage paths and then infiltrating through the stream bottom or banks. It will have limited value in reducing that turbidity which may be traveling entirely along an underground route. The contribution of the latter type of turbidity movement is considered to be minor, however. Changing the drainage pattern of the runoff from the highway areas would be the most effective way to prevent turbid water from flowing over previous drainage channels and moving toward the Authority's reservoirs. It is not considered practical, however, to take all of the drainage which is now designed to be discharged to Sawkill Creek and Vantine Brook and convey it to another stream. The areas adjacent to Sawkill Creek and to the west of Vantine Brook have small percentages of silt and clay particles and, based on filed observations, the contribution of turbidity from these areas probably is small. It is felt, therefore, that these areas could be drained as presently designed. Care should be taken at the discharge

points of the drains to reduce scouring by protection at the ends of culverts and by allowing the runoff water to flow over a few hundred feet of forest-covered land before it enters the water courses. In no case should high velocity water be discharged directly into the streams or directly onto bare soil.

* * * * * * *

The initiation of the drainage change described above, as soon as possible, should result in a significant improvement in the turbidity problem. Attention should be paid to all details to insure that all areas in the section are drained away from Vantine Brook. This work should result in an improvement both during the construction period and during the period while the highway slopes are stabilizing.

* * * * * * *

The redesign and construction of highway drainage to carry runoff water from the area east of Vantine Brook to Vandermark Creek is a potential solution which could be carried out immediately. This measure would have relatively few uncertainties, few operation and maintenance problems, and could substantially reduce the turbidity problem at the Milford supply.

* * * * * * *

Since quick results and economy are important considerations in the solution of the turbidity problem, revisions to the highway drainage and immediate work toward the stabilization of the highway slopes have advantages over the other methods proposed, even though there is some uncertainty that a complete solution to the turbidity problem will be

obtained. Observation of the turbidity problem can continue as this work progresses. It is possible that the turbidity problem will reduce sufficiently so that operating procedures at the Milford reservoirs can deal with the problem satisfactorily. If the problem does not diminish, then more definite measures can be taken, such as construction of a holding reservoir or a water treatment plant. Neither of these solutions could be effected rapidly. Either would make permanent improvements to the water system beyond what is needed to solve the turbidity problem related to the construction of Interstate Route 84.

* * * * * * *

The most certain way to solve the present turbidity problem at the Milford reservoir is to construct a complete water treatment plant and to treat therein all water supplied to the Milford water system.

* * * * * * *

If the methods outlined in Conclusions 8 through 10 are to be followed [including drainage revision], samples of water should be taken at the Milford reservoirs after each heavy rain . . . If, however, no improvement is observed, this will indicate a need for more elaborate facilities, such as a holding reservoir in the Milford system or a water treatment plant.

16. The formal "Recommendations" in the Report were as follows:

A. It is recommended that a program be undertaken at once in an attempt to economically solve the turbidity problem. Specifically, it is recommended that:

(1) The drainage facilities outlined in this report be redesigned and constructed to carry highway drainage east of Vantine Brook to Vandermark Creek.

(2) Highway drainage outlets in the Vantine Brook and Sawkill Creek watersheds be constructed at such locations and in such a manner that discharge velocities are reduced and, wherever practicable, drainage water transported over forested areas or in protected channels.

(3) The stabilization of highway slopes be started as soon as possible and checked periodically to determine its effectiveness with the objective of taking whatever measures are required to insure an effective vegetative cover.

(4) For the next two years, the water in the Milford reservoirs and in Vantine Brook at the reservoirs be sampled after each heavy rain, or during the occurrence of turbidity, to determine the effectiveness of the drainage changes and slope stabilization.

(5) Additional dye tests be conducted to try to determine the routes of infiltration to the Milford supply.

B. If the program outlined under A. above does not prove effective, it is recommended that a more elaborate program be undertaken. Specifically, it would be recommended that if all infiltration zones cannot be isolated and if the turbidity problem must be solved at the Milford reservoirs, the Pennsylvania Department of Highways should consider participating with the Municipal Authority of the Borough of Milford in the construction of a holding reservoir

which would be filled with water during times when there is no turbidity, and which would supply water to the system when both the present reservoirs are turbid.

17. In a meeting of November 6, 1968, the representatives of plaintiff, defendant, and Gasparini discussed the contractor's status in the light of the turbidity problem. Copies of the October 31, 1968, consulting Engineering Report were distributed.

18. On November 27, 1968, a meeting was held between representatives of plaintiff and of the Authority. A "Memorandum of Understanding" was drafted and signed by Mr. John Rezzolla, Chief Counsel for Penn DOT, and Mr. Robert Kayton, counsel for the Authority. In the Memorandum, the plaintiff agreed to provide, at its expense, a one and one-half million gallon holding reservoir and to implement a five-year monitoring program.

19. The Memorandum of Understanding was formalized and incorporated into an agreement dated January 23, 1969. The Agreement confirmed the undertaking of the plaintiff to build a 1.5 million gallon reservoir, and provided for a five-year surveillance program. The reservoir was to be completed by July 1, 1970.

However, on August 3, 1970, an Agreement was entered into between plaintiff and the Authority superseding the prior Agreement of January 23, 1969. In the 1970 Agreement Penn DOT agreed to pay the Authority $275,000. In return the Authority agreed to release Penn DOT from its promises made in the 1969 Agreement and to withdraw its court Complaint.

Although representatives of FHWA were aware of these negotiations and agreements, they were never formally approved or disapproved by FHWA.

20. The Authority has never constructed a holding reservoir which might be deemed a permanent improvement to MWA facilities. In fact, by August 3, 1971, the level of turbidity had lessened to levels well within the requirements of the U. S. Public Health Service with no appreciable difference between the quality of the water upstream from the construction and that downstream from the construction. According to the testimony of a Penn DOT engineer, this would indicate that the I-84 construction presently does not contribute any significant turbidity to the Milford water supply. Of course, it was unknown at the time of the settlement between the Authority and Penn DOT that the contemplated corrective measures would not in fact be needed.

The Gasparini Claim and Olmstead Borrow Site Dispute

21. By letter dated December 20, 1967, Gasparini requested plaintiff's approval of a borrow site[1] as follows:

> Reference is made to Item 5, Borrow Excavation, on the subject project.
>
> Pursuant thereto, the Gasparini Excavating Company, Inc. intends to obtain the required Borrow Material from an area located right of Stations 1515+ to 1520+ adjacent to the project right of way.

---

[1] "Borrow" is soil or rock material used to fill depressions and build embankments when the excavation obtained from the highway project itself is of insufficient quantity for the purpose. For the highway in question, the borrow needed by Gasparini, and found at the Olmstead site, was soil rather than rock.

Your permission is requested to allow the contractor to commence Borrow Excavation prior to the completion of required Class I Excavation on the project.

* * * * * * *

22. The site described in the December 20, 1967, letter was owned by a Mr. and Mrs. Olmstead and was commonly referred to as the "Olmstead site." When the contractor bid the project, he had anticipated using the property as a borrow site. Tests of the Olmstead borrow material had shown that it was satisfactory for the purposes of the contract. Further, the borrow source of the Olmstead property was sufficiently removed from the highway so as not to affect the aesthetics of the highway or interfere with construction operations. Unfortunately, the Olmstead property was adjacent to the Vantine Brook, a feeder stream for the reservior. Because of the potential for increased pollution of the reservior from borrow excavation at the location the Authority and Penn DOT discussed whether or not Gasparini should be denied the use of that site.

23. Gasparini's request of December 20, 1967, was its first formal request for a borrow site.[2]

24. The following contract provisions, in pertinent part relate to borrow operations:

(a) *Specifications, Section* 3.5.3

The obtaining of borrow pits shall be the contractor's responsibility.

* * *

---

[2] Such a request was required to be made in writing before the State's approval would be given.

Where the contractor desires to obtain borrow adjacent to the highway, written approval of the engineer shall be secured. * * *

(b) *Specifications, Section 3.5.4.*

Additional excavation material obtained within the highway limits, beyond the approved cross-section, in lieu of Borrow Excavation, will be measured and paid for at the lower contract unit price per cubic yard for either Class I Excavation or Borrow Excavation.

All suitable excavation shall be used in embankment within a grading section, except as otherwise specified, before any Borrow Excavation will be allowed, and deductions will be made from any materials in embankments outside of the approved cross-sections, except as otherwise provided. If the contractor desires to waste excavated material and provide borrow to replace it for his own convenience, or provide excavation in lieu of borrow, he may do so only after obtaining the written approval of the engineer and satisfactory arrangements have been made for the measurements and disposal of the material.

* * *

(c) *Specifications, Section 1.7.13*

* * * The contractor shall take all necessary precautions to prevent damage to all overhead and underground structures, and to protect and preserve property within or adjacent to the project and shall be responsible for damage thereto. Special care shall be exercised by the contractor in the prosecution of the work in order to avoid interference or damage

to any operating utilities or plants; however, where there is any possibility of interference or damage, the contractor shall make satisfactory arrangements with responsible officers or with the owners of the utilities or plants; covering the necessary precautions to be used as safeguards during the performance of the work by the contractor. These arrangements shall be made before said work is started and shall be subject to the approval of the engineer, which approval shall not be considered as releasing the contractor from any responsibility for the acts of himself or his employees or representatives.

* * *

(d) *Specifications, Section 1.7.19*

The contractor shall take sufficient precautions to prevent pollution of streams, lakes, and reservoirs with fuels, oils, bitumens, calcium chloride, or other harmful materials. He shall schedule and conduct construction operations to prevent when necessary, and otherwise minimize, pollution of streams, etc., with sediment or other harmful materials.

The areas of erosive land exposed by construction operations at any one time, which may cause subsequent water pollution, are subject to the approval of the Engineer. The location, operation and final condition of areas or pits from which borrow material is obtained is subject to the approval of the Engineer in order that erosion after the completion of the work will not result in water pollution and that water will not collect or stand therein, unless the borrow pit is appropriate to serve as a lake for recreation or other purposes.

25. In a letter of December 22, 1967, plaintiff conditioned its approval of the requested Olmstead borrow site upon the following condition:

> As this area is within the watershed of the Milford Water Co. approval must be secured that no contamination to their present supply will result from the excavation and removal of this material and written confirmation of this approval furnished to the Department by the Water Company.

26. Gasparini was unable to obtain the MWA's approval for use of the Olmstead site. Despite this fact, Gasparini continued in 1968 to seek plaintiff's unconditional approval of the site. Plaintiff's position was reaffirmed in its letter of May 6, 1968, to Gasparini stating:

> * * * As in our letter of December 22, 1967, you are reminded of the fact that removal of material from the referenced areas may result in subsequent involvements with the Milford Water Authority.
>
> In view of your awareness of the possible consequences, the Department's approval of your request for permission to proceed with the above noted Borrow Excavation is conditional upon the understanding that such approval in no way relieves you of your responsibility for damage claims as set forth in Section 1.7.19. Form 408, dated 1960.

27. Though Gasparini did attempt to locate other borrow sites during the spring of 1968, and was assisted by plaintiff in the search, the attempted location of another site was predicated on Gasparini's unwillingness to select a site less convenient (and hence more costly to use) than the Olmstead site. Mr. Finn of Penn DOT esti-

mated that use of a less convenient borrow site might double Gasparini's cost of obtaining borrow. Gasparini's estimated contract price for borrow excavation had been in the neighborhood of $90,000.

28. Because of the problem of freezing of embankment materials, it was Gasparini's intent to postpone the start of borrow operations until the spring of 1968. In Northern Pennsylvania where the highway project was located, soil embankment operations cannot be carried out efficiently in the winter months. The dispute over the Olmstead site did not therefore cause any delay to Gasparini until late March or early April when the danger of prolonged freezing was reasonably past. Nonetheless, as of June 28, 1968, Gasparini still had not chosen an alternative borrow site, and Gasparini's attorney wrote plaintiff on that date, stating in part:

> As you know, we are hastily approaching the time when Gasparini must utilize the intended borrow area.

29. By letter of July 23, 1968, to the contractor, plaintiff agreed to the contractor's request that it obtain additional excavation in lieu of borrow by widening the cut slopes of the highway. The letter also stated:

> Since this additional excavation material will be obtained from within the limits of the highway, the basis of payment must be in accordance with Section 3.5.4(1), Form 408, 1960 which provides that it "be measured and paid for at the lower contract unit price per cubic yard for either Class I Excavation or Borrow Excavation."
>
> We wish to emphasize that the use of the referenced additional excavation may be at your option.

It is not the intent of this approval to in any way deprive you of the opportunity to obtain the necessary borrow material under the terms and provisions of contract Item No. 5, Borrow Excavation.

30. Gasparini was unwilling, however, to use excavation from widened cut slopes at the contract price for Class I excavation. Penn DOT therefore directed Gasparini to do so, by letter of August 12, 1968, stating, in part:

> It is of principal concern to the Department that the continued progress of the referenced project be maintained so as to insure completion of all work in time to permit scheduled future paving contracts.
>
> It also has become increasingly apparent that the circumstances which have influenced your willingness and ability to provide the necessary borrow excavation at the contracted unit price cannot be resolved in time to avoid a considerable delay to the project.
>
> Therefore, when the progress of construction requires additional excavation material, you are hereby authorized and directed to utilize such suitable material as can be obtained by widening the cut slopes between approximate stations 1468+50 and 1475+00 Eastbound, Rt. in accordance with revised construction cross-sections with which you will be provided.
>
> * * *
>
> Since the widening of the referenced slope area is at the direction of the Department, equitable compensation for any necessary additional clearing will be acknowledged by the Department.

31. On August 20, 1968, Gasparini first gave a written notice to plaintiff of its intention to assert a claim for delay based on the borrow dispute. The notice referred to Section 1.9.9 of the contract specifications providing as follows:

> Neither the contractor nor the surety shall be entitled to present any claim or claims to the Secretary or to the Board of Arbitration of Claims named in the contract, either during the prosecution of the work or upon completion of the contract, for additional compensation for any work performed which was not covered by the approved drawings, specifications and/or contract, or for any other cause, *unless he or it shall have given the Secretary due notice in writing* of his or its intention to present such claim or claims as hereinafter designated; provided, however, that the contractor or his surety shall not be denied the rights to present any claim which is based on differences in measurements or errors of computations which are not disclosed until preparation of the final certificate.
>
> The *"due notice in writing"* as required above, must have been given to the Secretary of Highways or the engineer within ten (10) days of the time the contractor performed such work or any portion thereof, should have performed such work or any portion thereof, or was impeded or prevented from doing such work or any portion thereof by the Department of Highways, its authorized representative or anyone else; that is to say the contractor must give due notice in writing ten (10) days from the inception of the claim as a condition precedent to presenting the claim.

32. Gasparini did utilize excavation material obtained from widening of cut slopes during 1968. When the source was exhausted in 1969, plaintiff obtained borrow material from a site owned by a Mr. and Mrs. Myers adjacent to the highway. The use of the Myers' borrow caused Gasparini to incur increased hauling costs over those expected from the Olmstead site, and since the Myers' borrow was more coarse than the Olmsteads', it became necessary to have workmen manually clear stones from the material.

Settlement with Gasparini Excavating Co., Inc.

33. A meeting was held on February 4, 1970, at Gasparini's request, to discuss its claim against Penn DOT. Gasparini's claim was for additional costs based on alleged delays attributable to the unavailability of the Olmstead borrow site and the suspension of certain construction operations pending the outcome of negotiations between Penn DOT and MWA. The contractor requested an acknowledgement by plaintiff that its claim was justified. Plaintiff's District Construction Engineer, John M. Finn, originally rejected the request, stating that Penn DOT's evaluation would consider such factors as the contractor's responsibilities to other parties and properties under the contract specifications, as well as the contractor's evident failure to efficiently prosecute the work within the allotted working time, subsequent to the periods during which they contend the delays and restriction occurred. Thereafter on February 20, 1970, Gasparini submitted a formal, written claim for an equitable adjustment of $2,314,017.25.

34. A second meeting with Gasparini was held on March 25, 1970, to discuss the contractor's claim. At a

third meeting held April 9, 1970, Gasparini presented an alternative proposal based on actual cost records plus a profit of 10 percent. Though plaintiff did not initially concede any liability, its representatives met in closed session following the contractor's presentation, and tentatively concluded that it would pay Gasparini an equitable adjustment based on actual costs plus a profit. Gasparini confirmed its willingness to enter into such an agreement by letter of April 10, 1970. Settlement with Gasparini was concluded when Penn DOT agreed by its letter of April 28, 1970, to pay Gasparini an equitable adjustment based upon actual costs plus a 10 percent profit. The adjusted total payment to Gasparini for which Penn DOT here seeks 90 percent reimbursement from defendant is $835,612.45

35. Gasparini's claim for $2,314,017.25 was based on the following breakdown:

DAMAGES FOR
GRADING AND DRAINAGE DELAYS
METHOD NO. 2

BASED ON JOB COSTS AND ACCEPTED EQUIPMENT
CHARGES AND ALLOWABLE PERCENTAGES

	TO NOV. 30, 1969	ADJUSTMENT DEC. 1, 1969 TO COMPLETION	COST	ALLOWABLE PER CENT	TOTAL COST
				20%	
LABOR	$ 953,349.78	$ 25,700.00	$ 979,049.78	$ 195,809.96	$1,174,859.74
EQUIPMENT	2,175,292.82	31,500.00	2,206,792.82		2,206,792.82
PROTECTIVE EQUIPMENT	14,362.17	3,500.00	17,862.17		17,862.17
FUEL	71,090.88	2,500.00	73,590.88		73,590.88
				15%	
MATERIAL	216,772.73		216,772.73	32,515.91	249,288.64
INTEREST					33,000.00
	$3,430,868.38	$ 63,200.00	$3,494,068.38	$ 228,325.87	$3,755,394.25

TOTAL COST	$3,755,394.25
PAID BY ESTIMATE	- 1,441,377.00
EQUITABLE DAMAGE ADJUSTMENT	$2,314,017.25

36. Gasparini's alternative claim for actual costs plus profit, in the amount of $846,777.90, was based on the following breakdown:

DAMAGES FOR
GRADING AND DRAINAGE DELAYS
METHOD NO. 1

BASED ON GASPARINI EXCAVATING COMPANY, INC. JOB-COST RECORDS

	TO NOV. 30, 1969	ADJUSTMENT DEC. 1, 1969 TO COMPLETION	TOTAL COST
LABOR	$ 953,349.78	$25,700.00	$ 979,049.78
EQUIPMENT	585,980.32	35,000.00	620,980.32
FUEL	71,090.88	2,500.00	73,590.88
MATERIAL	216,772.73	–	216,772.73
MISCELLANEOUS	25,686.49	4,000.00	29,686.49
OVERHEAD	219,737.09	4,200.00	223,937.09
	$2,072,617.29	$71,400.00	$2,144,017.29

ACTUAL COST	$2,144,017.29
ACTUAL INCOME	1,441,377.00
ACTUAL LOSS	$ 702,640.29
ANTICIPATED PROFIT ($1,441,377.00 X 10%)	144,137.70
EQUITABLE DAMAGE ADJUSTMENT	$ 846,777.90

NOTE: Should the Department agree to accept the above method for equitable adjustment, the Contractor hereby further agrees to make Gasparini Excavating Company, Inc. Job-Cost Records available to the Department.

37. Penn DOT sought a legal opinion from Robert W. Cunliffe, Pennsylvania Deputy Attorney General, as to the legal basis for a payment to Gasparini. By memorandum of April 20, 1970, Mr. Cunliffe, who had monitored the disputes with MWA and Gasparini from their inception, gave the following legal opinion:

> It is our opinion that the Department would be held liable for damages to the contractor on his contract in an action before the Board of Arbitration of Claims for the following reasons:
>
> 1. The 408 Specifications state that the Department shall approve all borrow pits. By letter of December 22, 1967, from the Department to the contractor, the latter was required to obtain the approval of the Milford Water Company for his borrow pit on the Olmstead property. The Department thus breached the contract by interjecting a third-party not contemplated by the specifications.
>
> 2. The Department knew before the contract was let that problems could develop as to the water supply of the Milford Water Company. It failed to give the contractor notice of this possibility or to insert any special requirements in the proposal. Under the holding of the Board of Arbitration of Claims in the case of Langenfelder vs. Pennsylvania Department of Highways, on a project on I-81 Cumberland County, the Department would be found liable to the contractor because of fraud and misrepresentation.
>
> 3. The contractor ran into an unforeseen condition when the underground water became disturbed. By reasonable inspection prior to bidding he could not have discovered this.

38. Similarly, on July 2, 1970, William C. Sennett, the Attorney General of the Commonwealth of Pennsylvania, wrote Mr. Robert P. Casey, the Auditor General of the Commonwealth of Pennsylvania, as follows:

> In the instant case, the Department of Highways knew prior to advertising for bids that some damage could be caused to the water supply of the Milford Water Authority. They failed to reveal this fact to the bidders or to the successful bidder at the time of award. The Department's failure to take action to assure there would be no damage resulted in the Authority filing an injunction against the Commonwealth and the contractor, although the contractor was not at fault. In the case of *C. J. Langenfelder & Son, Inc. v. Commonwealth,* Board of Arbitration of Claims, Docket No. 151, the Board decided that the plans and soil profile furnished by the Department to the contractor constituted a warranty and representation that the conditions to be encountered on the project would be as therein indicated. As the conditions were not indicated, the Department committed an actionable wrong. Since in the instant case, the Department had notice that the water supply of the Authority might be affected and failed to so advise the bidders, it committed an actionable wrong as in *Langenfelder,* supra, where it withheld the Soils Survey Report.

39. Plaintiff's failure to act on the MWA's notice is also described in Mr. Finn's memorandum of April 28, 1970:

> Also deserving of comment, we believe, is the fact that the possible detrimental effects of the proposed construction on the Milford Water Authority's

facilities were made known to the Department during the design stages of the project. The failure to recognize and acknowledge this fact and incorporate definite, adequate precautions in the project design imposed construction conditions on the District Construction Unit and the Contractor which were all but impossible to correct or prevent and accomplish the proposed construction at the same time.

* * *

40. A letter dated July 20, 1970, to the Secretary of Transportation from Robert P. Casey explains the conclusion of the latter that plaintiff was negligent in its construction of the project in question.

The Department of the Auditor General has carefully reviewed your letter of July 9, 1970 concerning the above matter.

The first point made in your letter is intended to refute our statement that your department was negligent in the construction of Interstate 84 in the area of the water supply of Milford Water Authority. On this point I refer you to an agreement entered into between the Department of Highways and the Municipal Authority of the Borough of Milford dated January 23, 1969 wherein on page 2 the following language appears:

"Whereas, Commonwealth admits that the construction of said Interstate Highway 84 caused the said conditions of turbidity and impurity, . . ."

That agreement contains the signature of V. W. Anckaitis, Deputy Secretary of Highways.

Further proof of the negligence of the Department of Highways can be found in the contents of the memorandum dated April 20, 1970 from Robert W. Cunliffe, Deputy Attorney General, to P. W. Amos, Assistant Chief Engineer, Bureau of Construction. Referring to the equitable adjustment to the contract with the contractor, Mr. Cunliffe stated, "It is our opinion that the Department would be held liable for damages to the contractor on his contract in an action before the Board ofAbritation of Claims for the following reasons:

1. . . . the Department thus breached the contract by interjecting a third party not contemplated by the specifications.

2. The Department knew before the contract was let that problems could develop as to the water supply of the Milford Water Company. It failed to give the contractor notice of this possibility or to insert any special requirements in the proposal. Under the holding of the Board of Arbitration of Claims in the case of Langenfelder vs. Pennsylvania Department of Highways, on a project on I-81, Cumberland County, the Department would be found liable to the contractor because of fraud and misrepresentation."

Further substantiation of the allegation by this department that the Department of Highways was negligent in the construction of this highway can be found in a memorandum dated April 28, 1970 prepared by Thomas J. Harrington, District Engineer in charge of the Scranton office, and John M. Finn, Assistant District Engineer in charge of construction. On the third page of that memorandum the following language appears in the second last paragraph:

"Also deserving of comment, we believe, is the fact that the possible detrimental effects of the proposed construction on the Milford Water Authority's facilities were made known to the Department during the design stages of the project. The failure to recognize and acknowledge this fact and to incorporate definite, adequate precautions in the project design imposed construction conditions on the District Construction Unit and the Contractor which were all but impossible to correct or prevent and accomplish the proposed construction at the same time."

Finally, with respect to the allegation by this department that the Department of Highways was negligent in the construction of this project, we refer you to the July 2, 1970 opinion of Attorney General William C. Sennett. The Attorney General stated that "Since in the instant case, the Department had notice that the water supply of the Authority might be affected and failed to so advise the bidders, it committed an actionable wrong as in *Langenfelder,* supra, where it withheld the Soils Survey Report."

The opinion of the Attorney General clearly places the fault for any damage to the Milford Water Authority water supply on the Department of Highways.

The second point in your letter deals with the settlement by the Department of Highways for one-third of the amount claimed by the contractor, to wit $2,400,000, and infers that your department did an excellent job for the taxpayers in making that settlement. It must be pointed out that the original contract for the project called for a total payment of $3,047,572.94. Payments to date on this contract amount to $3,841,091.34, which includes

a payment over and above the original contract price of $769,000 on account of the negligence of the Department of Highways in delaying the contractor in completion of that project. In addition, the January 23, 1969 agreement signed by your department with the Milford Water Authority, which is presently being negotiated, could cause an additional payment of $300,000. In view of these figures, it is difficult for me to see your logic that your department's action in this matter was to the benefit of the taxpayers of Pennsylvania.

With regard to the third point contained in your letter that your department has never considered payment of $2,000,000 to the Milford Water Authority for damages caused by the negligence of the Department of Highways, this will advise you that Mr. Harold C. Poulson, an engineer with the Department of Highways, personally advised William H. Smith, Chief Counsel of this department, and Thomas P. Kennedy, Assistant Counsel, that if the Department of Highways had to comply with the terms of the agreement of January 23, 1969 referred to above and construct a 1½ million gallon reservoir, conduct a surveillance program of the Milford Authority water supply and then construct a filtration plant, the total cost could exceed the figure of $2,000,000.

In view of the error made by the engineers in the Department of Highways regarding the effect by the construction on the Milford Water Authority supply of water, your statements that you know of no basis on which the subcontractors could file a claim, and that you expect reimbursement from the Federal Highway Administration for its share of the additional cost, is at best not reassuring.

Representatives of the Department of the Auditor General thoroughly reviewed all the circumstances and facts, including an examination of documents in the possession of your department, with representatives of the Department of Highways both in Harrisburg and in the Scranton Office. The allegations in my letter of July 2, 1970 concerning the negligence of your department were based upon that review and the facts disclosed by examination of your files.

* * *

41. During his testimony at trial, Mr. Casey was shown a letter dated December 27, 1965, in which the MWA advised plaintiff that the highway construction was not expected to affect MWA's supply. The letter stated:

> We have been advised by our engineer, that he does not believe that the construction of this highway will affect our springs or the probable locations of the veins of water leading to the springs.
>
> However, there is always a possibility that if there were deep cutting or blasting done in the event [sic] of these veins, the supply of water to these springs could be disrupted.

Mr. Casey stated that he could draw no firm conclusions about the letter because he did not know what other subsequent correspondence or events might reveal an updated, contrary view. He further observed that "latitude has got to be granted to people in the position of those designing and constructing highways." He believed that a "fair amount of discretion" must be given to the "difficult judgment calls" confronting people who design and construct highways.

Plaintiff's Claim For Federal Participation

42. A state highway department may enter into a settlement or otherwise commit itself to additional expenditures with or without prior Federal approval. If the highway department does so without prior Federal approval, the FHWA will examine the settlement to determine the extent to which Federal participation is justified.

43. If a state highway department desires advance Federal approval, it should make such a request by submitting a written recommendation for FHWA's consideration and approval. Plaintiff did so in the instant case only orally. However, throughout the negotiations with the Authority, the FHWA was kept fully informed on all levels. They were invited to and attended all meetings where the claims of the Authority and the contractor were discussed. Despite being deliberately invited to these negotiation sessions, they refused to offer guidance one way or the other. At none of these meetings were there ever any objections voiced by the FHWA regarding the manner in which the settlements were proceeding. This refusal to offer guidance caused Penn-DOT to conclude that there would be no objections to the settlements.

44. By letter dated March 21, 1969, to the FHWA, plaintiff described the factual basis for its settlement with the MWA. By letter of July 1, 1969, the FHWA responded, requesting information with regard to the legal basis for liability of plaintiff to the MWA. Plaintiff responded to this request on August 11, 1969. Additional information was sought by the FHWA in March 1970, and supplied in May 1970.

45. The FHWA denied participation in the MWA settlement on August 7, 1970. After a subsequent con-

ference with plaintiff's representatives, the FHWA agreed to reevaluate its position. Further information was developed in 1971 and 1972. During the same period, the FHWA was evaluating plaintiff's claim for participation in the settlement with Gasparini.

46. On January 23, 1973, the FHWA discovered that plaintiff's August 28, 1970, voucher claiming reimbursement of 90 percent of the $275,000 settlement with the MWA had been paid. A letter to plaintiff of that date demanded a credit for that amount:

> On August 7, 1970, in a letter to Mr. David Sims, we advised that Federal-aid participation would not be extended to cover costs concerning the Milford Water Authority. However, Penn DOT initiated a Modified Project Agreement and Progress Voucher No. 23 on August 28, 1970 claiming reimbursement for $275,000 under Right-of-Way Project I-84-1 (12)-46 [another highway project]. The reimbursement was for Claim No. 5100945, the Municipal Authority of Milford. Reimbursement was inadvertently permitted by this office on October 1, 1970.
>
> Since the costs were declared ineligible for Federal-aid participation under the construction project, reimbursement should not have been requested or paid under the right-of-way project. Although Penn DOT's appeal submission of January 28, 1972 is still undergoing review and reconsideration, our official position at this time must remain as stated in our letter dated August 7, 1970. Therefore, please issue a credit for $275,000 on Project I-84-1 (12) 46.

47. Plaintiff did not issue the demanded credit. On December 20, 1973, the FHWA deducted the disallowed amount from another voucher of the plaintiff.

48. By letter of December 18, 1974, the FHWA denied all participation in the settlement with Gasparini, and offered to participate only to the extent of 90 percent of $58,000 in settlement with the MWA. Defendant's offer was rejected by plaintiff, which thereupon filed the instant action in this court.

CONCLUSION OF LAW

Upon the foregoing findings of fact and opinion which are adopted by the court, the court concludes as a matter of law that plaintiff is entitled to recover, and judgment in its favor is hereby entered in the sum of $999,-551.20. Defendant's counterclaim for interest is dismissed.